Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Definition of Radio Markets for Areas Not Located In An Arbitron Survey Area	)	MB Docket No. 03-130

TO THE COMMISSION

PETITION FOR RECONSIDERATION

David Honig
Executive Director
Minority Media and
Telecommunications Council
3636 16th Street N.W., Suite B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@crosslink.net

Counsel for Diversity and
Competition Supporters

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SUMMARY

We, the Diversity and Competition Supporters, include both of the largest Hispanic organizations in America, as well as some of the largest and most respected African American, Asian American and Native American organizations. We include the organizations representing the nation's Hispanic broadcasters and the nation's minority journalists. We represent millions of Americans.1/

No one has an expectation of approval of every paper she lodges with the government. But all parties, large and small, are entitled to respect for exercising their rights under the Petition Clause of the First Amendment. Everyone is entitled to have her comments considered, fairly evaluated, and ruled upon.

Among many other things, the Commission failed even to acknowledge eleven of our fourteen proposals,2/ emasculated a twelfth,3/ irrationally postponed a thirteenth,4/ postponed the fourteenth without explanation,5/ repealed without notice its only policy designed to protect minority television ownership,6/ twice failed to act on a time-sensitive pre-Comment-date procedural motion,7/ omitted mention of the first hearing on minority ownership in 19 years;8/ failed to mention that we had sought a stay,9/ and then rushed to a vote -- actually saying "the record is complete" although scores of filings tendered during the

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1/ The views expressed in these Comments are the institutional views of the Diversity and Competition Supporters, and do not necessarily reflect the individual views of each of their respective officers, directors, advisors or members.

2/ See pp. 14-28 infra.

3/ See pp. 8-10 infra.

4/ See pp. 10-12 infra.

5/ See pp. 13-14 infra. This proposal was lumped together with twelve nonregulatory proposals that were not intended for, nor were they submitted to, the Commission. See p. 13 n. 92 infra.

6/ See pp. 32-36 infra.

7/ See p. 4 n. 44 infra.

8/ See pp. 4-5 infra.

9/ See Letter to Hon. Michael K. Powell from David Honig, April 21, 2003; Letter to Hon. Michael K. Powell from David Honig, April 28, 2003 ("April 28, 2003 Letter"), pp. 22-23. As the Third Circuit pointed out yesterday, "under the unique circumstances of this case, it appears virtually certain that the Commission would not grant a stay in this matter." Prometheus Radio Project v. FCC, No. 03-3388, Order #E-59 (per curiam, September 3, 2003) ("Prometheus Stay Order") (granting stay).

most critical twelve last days of the proceeding had yet to be logged in.[10] To appreciate the magnitude of these acts and omissions, please imagine this:

It is September, 2006 and another UNE-P triennial review opens with an NPRM that is associated with twelve Commission research studies. In October and November, Verizon, BellSouth, SBC and Qwest (the "BOCs"") move twice for an order seeking public comment on five additional Commission research studies and seeking expanded review of certain policies relating to the protection of BOC subscribers. Each time, the Bureau says it is reviewing the motions, and it promises to rule on them. By January, 2007, comments are due, but the Bureau has not yet ruled on the motions. Nonetheless, the BOCs file fourteen proposals which, when combined with earlier filings incorporated into the docket, consume hundred of pages of text and evidentiary support. The BOCs' comments are timely filed and all of the BOCs' supplemental filings are lodged within the time allotted.

In 2003, the Commission had adopted its only policy (the "BOC Subscriber Protection Feature") designed to protect the BOCs' subscribers. Since the NPRM did not address that policy, the BOCs only briefly mention it in their comments.

In April, unsure whether the Commission would actively review their proposals, the BOCs ask for a stay. In May, a public hearing is held on the issues raised by the BOCs, and four commissioners participate in the hearing. Then, one day before the record closes, AT&T files a letter withdrawing its endorsement of one of the BOCs' key proposals. Noting that the docket does not reflect AT&T's letter and other pertinent filings (including several of the BOCs' own filings), the BOCs file a "Motion to Postpone the Vote", in which they point out that the comments and ex parte filings are running twelve days behind the capacity of the Commission's

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10/ That is not an exaggeration, and actually it is even worse. On May 31, 2003, we moved for a postponement of the vote until the 12-day delayed record actually caught up with the docket so that thousands of filings (including ex parte letters filed under 47 C.F.R. §1.1206) could be reviewed. See Emergency Motion of the Diversity and Competition Supporters et al. for a Brief Postponement of the Vote, Due Largely to the Collapse of the Commission's Public Comment System" (May 31, 2003). Obviously the record was not complete; yet the Commission denied the motion by holding that "the record is complete." The Commission also blamed us for "failure to file [our] comments or requests in a timely fashion." Report and Order, n. 1323. But we did file our Comments and Reply Comments on time, and our supplemental filings were also filed within the time expressly allotted for them -- just as were supplemental filings by virtually all major trade organizations and corporate parties as well as about 750,000 individuals. An ex parte letter we filed May 30, 2003, which was a factor in our motion, was submitted only a day after (and in response to) an unexpected filing in which the NAB changed a position it had held for four years -- but the NAB was not chided for failing to file "in a timely fashion." See discussion at pp. 9-10 and ns. 70 and 76 infra.

computer system and staff to keep up with them.

In its July Report and Order, the Commission denies the October and November, 2006 motions without explaining why they were not ruled on before January, 2007.

The Commission does not explain why it did not call for public comment on the five studies.

Not only does the Commission fail to grant a stay, it fails to mention that a stay had been sought.

It denies the Motion to Postpone the Vote, saying that "the record is complete" and blaming the BOCs for supposedly not submitting its comments and other filings on time.

It does not cite to the hearing transcript. Indeed, the Commission does not mention that the hearing ever took place.

It postpones one of the BOCs' proposals in a sentence, without explanation.

It postpones review of another proposal until it determines whether granting the proposal might offend an especially malodorous federal policy that had been discarded 35 years earlier.

It dilutes and emasculates a third proposal by applying it to a category of regulatees whose composition, as the Commission acknowledges, is actually unknown.

The Commission fails to mention the existence of the BOCs' eleven other proposals.

Finally, the Commission repeals the BOC Subscriber Protection Feature. In doing so, it fails to mention that the Feature had been adopted to protect BOC subscribers.

If we were monied interests, congressional hearings would be held and heads would roll. Still, we are ever optimistic that the Commission will take corrective steps, including reversal of each of the above-analogized actions and omissions. Furthermore --

We ask that the Commission develop voice tests for television that include only those "voices" that nearly all Americans -- and not just the 85% who can access and afford cable or satellite service -- actually receive.[11]

11/ See pp. 28-29 infra.

We ask that the Commission reverse its unanticipated and unprecedented authorization of triopolies. We explain that triopolies would take off the transaction table the critical big-city television properties which would be the linchpins of any new over-the-air national network primarily serving youth and children, minorities, or people of faith.[12/] We also show that by preferring local synergies to national and regional synergies, triopolies would close the door to new entrants seeking to build new national or regional television station groups.[13/]

We ask the Commission to undo its repeal of the sales solicitation feature of its failed/failing/unbuilt stations policy (the "Sales Solicitation Feature"), under which in-market sellers had to offer their stations to potential buyers outside their market. This was the only structural policy created specifically to protect minority and female television ownership -- a critical fact not even mentioned in the Report and Order.[14/] We point out that by abandoning this policy, the Commission has crossed the line from merely permitting consolidation to affirmatively promoting consolidation. In doing so, the Commission has given in-market buyers a free hand to shut out minorities, women and new entrants, and to force sellers to create duopolies and triopolies.[15/]

We urge the Commission to relax and update its ancient community of license and transmitter site rules, which were well suited for the buildout of radio in its early years but which inhibit competition and diversity today. Specifically, we propose that:

1. A licensee whose station is in an Arbitron market should be able to choose any community of license in its Arbitron market, as long as its operation there would not violate the interference rules.

2. A licensee whose station is not in an Arbitron market, yet draws the majority of its listeners from an Arbitron market, should be allowed to relocate to any community in that market if, in doing so, it does not violate the interference rules.

3. A station's 60 dbu contour should be required to cover 50% of the population of the community of license.[16/]

12/ See pp. 30-31 infra.

13/ See pp. 32-32 infra.

14/ See pp. 32-33 infra.

15/ See pp. 34-36 infra.

16/ See pp. 36-38 infra.

The first priority for move-ins would be stations owned by SDBs; the second would be lower powered suburban facilities that could become competitive full market signals if moved in. After all of the move-in applications are processed, filing windows for drop-ins and signal upgrades would open up to allow for backfilling of the spectrum freed up by the move-ins. Consistent with the Section 307(b) priorities, these filing windows would open in this order:

1. Full power drop-ins that provide new or competitive local service whose audience will primarily be a rural community;
2. Rural LPFMs;
3. Rural translators;
4. Urban translators; and
5. Class of service, power, and tower height upgrades of full power stations

We demonstrate that move-ins would especially help minority owned companies, which are burdened with signals that do not adequately cover their markets.[17/] Further, we document how more move-ins and drop-ins would increase radio's economic competitiveness, improve service to urban and rural communities, and create numerous opportunities for new entrants.[18/]

In Grutter v. Bollinger,[19/] this June, the Supreme Court found that racial diversity in the classroom promotes competitiveness and quality in business. In like manner, racial diversity in broadcasting promotes competitiveness and quality in the programming that sustains the well informed populace that is essential to democracy. Thus, we ask the Commission to determine how it can apply the teachings of Grutter to its structural ownership regulations.[20/]

17/ As we point out:

> Ironically, Jim Crow residential segregation has disproportionately locked minority radio listeners into the inner cities, while the equally strange fruit of broadcast licensing discrimination has disproportionately locked minority broadcasters into the suburbs. Relaxation of the community of license and transmitter site rules would do much to repair this historical damage by enhancing the value of the holdings of minority owners. On top of this...the creation of new rural allotments from freed-up rural spectrum would provide ownership opportunities for new entrants, including minority managers ready to buy or build their first stations.

Infra, p. 44 (fn. omitted).

18/ See pp. 41-42 infra.

19/ Grutter v. Bollinger, ___ U.S. ____, 123 S.Ct. 2325 (decided June 23, 2003) ("Grutter"). See pp. 44-47 infra.

20/ See p. 47 infra.

Standing in the west hallway of the 8th floor of the Commission's offices, one can look out and see a sacred place. It is the granite block marking the spot where Dr. Martin Luther King stood, 40 years and seven days ago, in the shadow of history. No words could better capture the reason for our filing of this Petition in 2003 than the words Dr. King left in 1963 for our contemplation:

> [W]e have come here today to dramatize an appalling condition. In a sense we have come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir.
>
> This note was a promise that all men would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness. It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check which has come back marked "insufficient funds." But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation.
>
> So we have come to cash this check -- a check that will give us upon demand the riches of freedom and the security of justice. We have also come to this hallowed spot to remind America of the fierce urgency of now. This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism. Now is the time to rise from the dark and desolate valley of segregation to the sunlit path of racial justice. Now is the time to open the doors of opportunity to all of God's children. Now is the time to lift our nation from the quicksands of racial injustice to the solid rock of brotherhood.[21/]

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21/ Delivered on the steps at the Lincoln Memorial in Washington D.C. on August 28, 1963. Source: Martin Luther King, Jr: The Peaceful Warrior, Pocket Books, NY (1968).

The Diversity and Competition Supporters (identified in Annex 1), pursuant to 47 U.S.C. §405(a) and 47 C.F.R. §1.429, respectfully petition for reconsideration of the Report and Order, FCC 03-237 (released July 2, 2003) ("Report and Order").

I. The Commission Recognized, But Failed To Address, The Need To Preserve Ownership By Minority And Other Disadvantaged Businesses

Minorities hold just 1.3% of the asset value of American broadcasting[22/] -- the most influential industry in the world. That is a national disgrace. During the last century, Congress and the courts took action to cure minority exclusion from the exercise of democracy, which was perpetuated by denial of access to the ballot.[23/] Now is the time for the Commission to cure minority exclusion from the process of democracy, which is being perpetuated by denial of access to the electronic media.[24/]

The Commission, Congress and the courts have long been uncomfortable with the abysmally low incidence of minority ownership.[25/] Since 1975, the Commission has been obliged to tailor its structural ownership rules to foster minority ownership.[26/] To its credit,

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22/ See Initial Comments of Diversity and Competition Supporters in MB Docket No. 02-277 (filed January 2, 2003) ("Initial Comments"), p. 17.

23/ Throughout the first eight generations of the Republic, people of color could not participate fully in government. During that time, trillions of dollars worth of broadcast licenses were given away for free to Whites only. See Initial Comments, pp. 19-35; Comments of MMTC in MM Docket 01-317 (filed March 19, 2002) ("Radio Ownership Comments"), pp. 71-104. To bracket this history, recall that the Supreme Court's first modest step toward enfranchisement of all Americans was taken in the same year the Radio Act was adopted. Nixon v. Herndon, 273 U.S. 536 (1927) (outlawing the White primary). The Court outlawed literacy tests for voting the year after the FCC adopted its first EEO rules; see Oregon v. Mitchell, 400 U.S. 112 (1970) and Nondiscrimination in the Employment Practices of Broadcast Licensees, 18 FCC2d 240 (1969).

24/ Minority inclusion in broadcasting enhances minority access to democracy. Without Black owned radio, David Dinkins and Harold Washington would never have been elected Mayor of New York and Mayor of Chicago respectively. See, e.g., Testimony of Tony Gray, President, Gray Communications, at Public Hearing on "The Impact of Media Consolidation on Minority Representation and Ownership," Detroit, Michigan, May 19, 2003, Tr. 46 ("Detroit Hearing Transcript"), Excerpts at Annex 3 hereto.

25/ The relevant statutes, legislative history, and court and commission caselaw are discussed at length in the Initial Comments, pp. 50-61.

26/ See Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975). In 1985, the Commission acknowledged that "our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership." Multiple Ownership of AM, FM and Television Broadcast Stations (MO&O on reconsideration), 100 FCC2d 74, 94 (1985) (prior and subsequent histories omitted) (adopting the Mickey Leland Rule, which provided that an interest of up to 49% in minority-controlled stations would not be subject to attribution with respect to two stations per service beyond the otherwise applicable national ownership caps). In the first biennial review, the Commission acknowledged that it "has a statutory obligation under Section 309(j) of the Act as well as an historic commitment to encouraging minority participation in the telecommunications industry." 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (NOI), 13 FCC Rcd 11276, 11283 ¶22 (1998).

albeit after a slow start,[27] the Commission devoted a section of the Report and Order to "Minority and Female Ownership Diversity."[28] There the Commission declared that "[e]ncouraging minority and female ownership historically has been an important Commission objective, and we reaffirm that goal here."[29] Yet nothing in the Report and Order will put a significant dent in the endemic problem of minority underrepresentation in media ownership.[30] Instead, read in their entirety, the rules adopted in the Report and Order will seriously undermine minority representation in media ownership.[31]

The canary in the well was the aftermath of the Commission's 1999 decision to allow local duopolies.[32] At that time, minorities owned 33 full power commercial television stations, but the duopoly rule brought to 22 the number of minority owned stations. Many of those 22 stations are unprofitable; thus, minority broadcasters are unlikely to be able to strengthen their positions through duopoly or crossownership. Triopolies present an even greater danger, since they will lock up the only big market facilities around which it would have been possible to build an independent television group owner or a new over-the-air network.[33]

The new ownership combinations permitted under the new rules will provide a boost to the competitors of minorities, who have already had a two-generation headstart in access to the radiofrequency spectrum.[34] For two generations, nonminority owned companies have not had

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27/ The notice of proposed rulemaking in the radio ownership proceeding did not even mention minority ownership. See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets (NPRM and Further NPRM), 16 FCC Rcd 19857 (2001). This was later clarified by an exchange of letters. See Radio Ownership Comments, p. 2 and n. 3.

28/ Report and Order, ¶¶46-52.

29/ Id., ¶46 (fn. omitted).

30/ The history of minority underrepresentation in media ownership is discussed in the Radio Ownership Comments, pp. 71-104, and in the Initial Comments, pp. 17-35. A primary cause of minority exclusion from media ownership was the Commission's two generations of issuing and routinely renewing broadcast licenses of rabid segregationists. See Radio Ownership Comments, pp. 71-90. In 1955, the Commission went so far as to hold that the Communications Act is not inconsistent with state segregation statutes. Southland Television Co., 10 RR 699, recon. denied, 20 FCC 159 (1955) (discussed in the Radio Ownership Comments, pp. 81-84).

31/ See Statement of Kofi Ofori, Annex 2 hereto, §1 ("Ofori Statement")

32/ See discussion at pp. 5-6 infra.

33/ See pp. 30-32 infra.

34/ See Radio Ownership Comments, pp. 93-98, discussing the "Analog Divide", under which, as a consequence of their late entry into broadcasting, minorities were relegated "disproportionately to high-band low power AMs and low-tower low power FMs." Id., p. 93.

to face minority competition. Using the new rules, nonminority owned companies will quickly lock up the most valuable available stations and integrate them into horizontal and vertical combinations. Stations are almost never sold out of these combinations.[35/] Indeed, by suddenly repealing the Sales Solicitation Feature, the Commission, for the first time in its history, has crossed the line from permitting consolidation to promoting consolidation.[36/]

Our greatest fear is that investors could doubt whether minority broadcasting still has the potential for growth. If that happens, we can expect further limitations on the capital available to minority broadcasters, thereby further accelerating the decline in minority ownership.[37/]

Most critically, the new rules contain virtually no new plans to assist minorities and other disadvantaged businesses in securing or preserving access to broadcasting. Instead, the creation of new policies to address minority ownership has been -- once again[38/] -- put off for another day, while the real action takes place on a field where almost no minorities are players.[39/]

35/ See Ofori Statement, §6 ("A company whose business plan is based on growing clusters will never include in that business plan an option of reducing the size of the cluster by spinning off one of these core stations. While it is not always optimal to have a cluster of the maximum permissible size, it is seldom desirable to reduce the size of any cluster. If the cluster is performing poorly, the cause of that poor performance will almost never be attributable to the decision to include a full service station in the cluster. Even if such a station performs poorly within a cluster, the business solution is always to reprogram the station rather than spin it off to a competitor.")

36/ See pp. 32-36 infra.

37/ See Ofori Statement, §1 ("If investor confidence in minority broadcasting lags significantly, we can expect further constraints on the already severe and well documented lack of access to capital faced by minority broadcasters" (fn. omitted)). Minorities' lack of access to capital is discussed in the Initial Comments, pp. 32-37.

38/ The outlook for new minority ownership policies appeared promising in 1995, when the Commission simultaneously released, and linked to each other, notices of proposed rulemaking addressing multiple ownership, attribution and minority ownership. See discussion and citations in Initial Comments, pp. 13-14 n. 23. Unfortunately, after Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), the minority ownership docket was disaggregated from the multiple ownership and attribution dockets, and it has sat dormant ever since. See Radio Ownership Comments, pp. 6-7 n. 11. On December 12, 2000, the Commission released six studies on minority ownership (the "Section 257 Studies"). See discussion and citations in Initial Comments, pp. 29-34. A month later, in the course of rejecting MMTC's petition for reconsideration of the Commission's decision to allow TV duopolies in many markets, the Commission declined to consider MMTC's minority ownership proposals in the TV local ownership proceeding because the Commission had not yet evaluated the Section 257 studies. Review of the Commission's Rules Governing Television Broadcasting (MO&O on reconsideration), 16 FCC Rcd 1067, 1078 ¶33 (2001) (prior and subsequent history omitted) ("Television Broadcasting - Reconsideration") ("[w]hile we are concerned about minority ownership, we believe...initiatives to enhance minority ownership should await the evaluation of various studies sponsored by the Commission"); see also id. at 1078-79 n. 69. That review never took place, however. Thus, eight years have passed with much study but no action on minority ownership.

39/ See, e.g., Report and Order, Dissenting Statement of Commissioner Michael Copps, p. 21. Having correctly found that minority ownership must be addressed in this proceeding, the Commission should not have allowed the Report and Order to take effect until it could certify that it had taken steps reasonably sufficient to preserve and promote minority ownership.

To be sure, the Commission has created the Advisory Committee on Diversity in the Digital Age ("Diversity Committee"), which we were proud to endorse.40/ However, the Diversity Committee should be a supplement to, rather than a substitute for, addressing minority ownership in the rulemaking itself.41/ Even if, by mid-2004, the Diversity Committee proposes and the Commission adopts substantial policies to promote minority ownership, that will be too late. By then, the most desirable properties will have been locked up in vertically and horizontally integrated clusters. Trade reports suggest that this dealmaking will be in full swing within months.42/

Yet even after adopting rules that will dramatically undermine the Commission's minority ownership objectives, the Commission fell back on the oldest of rationalizations for doing nothing: "we believe additional evidence is necessary, however, before we reach conclusions on these important issues."43/ It is astonishing to be told now that "additional evidence" is needed when the Commission failed even to call for comment on the extensive evidence contained in the Section 257 Studies44/ -- studies the Commission failed for three years to act upon.45/ Nor did the Commission cite the transcript (filed in this Docket) of the first hearing on minority broadcast ownership since 1984.46/ Remarkably, even though four commissioners participated in the hearing, the Report and Order did not acknowledge that it even

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40/ See Release, "MMTC Endorses FCC Diversity Advisory Committee," May 27, 2003.

41/ See pp. 13-14 infra (discussinng referral, to the Diversity Committee, of proposal for waivers of structural rules for selling stations to SDBs); id. pp. 10-12 (discussing referral, to Diversity Committee, of proposal to ban discrimination in the sale of a broadcast station).

42/ See, e.g., Tom Taylor, "Lew Dickey Forecasts another wave of consolidation in the next 12 to 18 months," Inside Radio, August 6, 2003, p. 2 (reporting prediction of the CEO of Cumulus Broadcasting). See also Ofori Statement, §1.

43/ Report and Order, n. 70.

44/ Two months before comments were due, MMTC and NABOB asked the Commission to affirm that minority ownership is a central interest in the proceeding, include the Section 257 Studies in the record and seek comment on them, and address the attribution rules in the proceeding. MMTC/NABOB Motion for Extension of Procedural Dates, Expansion of the Scope of the Proceeding, and Inclusion of Additional Studies in the Record (October 9, 2002), p. 1; see also MMTC/NABOB Motion for Further Extension of Time (December 9, 2002), p. 3. The Commission promptly stated that these issues "remain pending with the Commission and will be addressed separately." Order, DA 02-2989 (MB, November 5, 2002) at 2 n. 6; see also Order, DA 02-3575 (MB, December 23, 2002) at 3 n. 12. But the Commission did not rule on these requests until the Report and Order, and even then it did not explain its decision not to seek comment on the Section 257 studies after it sought comment on twelve other studies that did not address minority ownership. Report and Order, n. 70 and ¶629.

45/ See n. 38 supra.

46/ See Detroit Hearing Transcript, Annex 3 hereto.

took place.[47] Yet still we are told that "additional evidence" is needed, without a word that identifies what evidence is missing.

Such callous disregard for a subject this critical is antithetical to the command of Congress in the first section of the Communications Act: that the Commission was created to "make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service[.][48]

Regulation and rule enforcement have deep consequences for racial diversity in the media. Thanks largely to nonenforcement of the EEO rules since 1998, minority participation in radio and television news has dropped so dramatically that the RTNDA and UNITY have scheduled a Diversity Summit to address the problem.[49] In like manner, structural deregulation directly and adversely impacts minority ownership. In the three years after local TV duopolies were permitted in 1999, minority ownership of full power commercial television stations declined

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47/ The May 19, 2003 hearing was co-convened by the Governor of Michigan, both of Michigan's Senators, the two most senior Members of Congress, and the Mayor of Detroit. Presiding was Congressman John Conyers, the ranking minority member of the House Judiciary Committee. Four commissioners participated -- Commissioner Copps in person, and Chairman Powell, Commissioner Abernathy and Commissioner Adelstein through thoughtful and substantive videotaped statements. Numerous witnesses emphasized, with great passion and depth, the need for minority ownership initiatives to be adopted now. Yet in what must be a first for FCC rulemaking orders, the Report and Order did not even mention that the Detroit hearing had taken place. Future readers of the FCC Record would never know that it happened.

48/ 47 U.S.C. §151 (1996) (underscored language added in the Telecommunications Act of 1996).

49/ The 2003 RTNDA/Ball State University Annual Survey, which tracks minority participation in broadcasting, yielded these findings [n/a is "not available"]:

Job Category	% Minority (1994)	% Minority (2001)	% Minority (2002)	% Minority (2003)
Total TV News Workforce	17.1%	24.6%	20.6%	18.1%
Total Radio News Workforce	14.7%	10.7%	8.0%	6.5%
TV News Directors	7.9%	8.0%	9.2%	6.6%
Radio News Directors	8.6%	4.4%	5.1%	5.0%
TV General Managers	n/a	8.7%	5.2%	3.6%
Radio General Managers	n/a	5.7%	3.8%	2.5%

See Bob Papper, "Women & Minorities: One Step Forward and Two Steps Back, The Communicator (RTNDA, July/August, 2003), pp. 20-25. Minorities own 4.2% of the nation's radio stations, and hundreds of radio stations and dozens of television stations are Spanish language facilities. A 2002 MMTC analysis of broadcast employment patterns found that 52% of minorities in radio work at minority owned stations. See Comments of EEO Supporters in MM Docket 98-204 (Broadcast and Cable EEO) (April 15, 2002) ("EEO Supporters Comments in Docket 98-204"), p. 53 n. 124. It follows that nonminority owned English language stations almost certainly employ almost no minorities as news directors or general managers. RTNDA attributes the dramatic decline of minority participation in radio to "the elimination of the EEO rules." Id., p. 21.

from 33 stations to 20.50/

When the Commission adopted new EEO rules last year, Chairman Powell declared that "it is our obligation to attempt to widen the circle of those Americans that benefit from the fruits spawned by [broadcast] licenses."51/ Yet the Report and Order threatens to undo the achievements of the EEO proceeding even before the Commission begins to enforce those rules. As witnesses at the Detroit hearing pointed out, structural ownership deregulation tends to inhibit minority broadcast employment by reducing the number of entry-level and journalism positions.52/ A decline in minority broadcast ownership is likely to reduce minority broadcast employment even further, since minority owners are the single greatest feeders of minority talent into the broadcasting industry.53/

Conversely, given the need for on the job training to become an owner, the full inclusion of minorities in broadcast ownership is likely to be stalled by declining minority employment in broadcasting. Only major surgery in this proceeding can stop this self-feeding cycle of resegregation of broadcast ownership and broadcast employment.

In our Comments and subsequent filings, we proposed fourteen race-neutral regulatory initiatives aimed at promoting racial diversity in media ownership, and at promoting diversity in ownership generally. With only one last-minute exception,54/ no party opposed any of our

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50/ See Initial Comments, p. 18. The number of minority owned full power commercial television stations has since increased to 22. To be sure, our research shows that after local radio ownership deregulation in 1996, the number of minority owned stations increased although the number of minority owners decreased. See Kofi Ofori, "Radio Local Market Consolidation and Minority Ownership" (March, 2002) ("Consolidation and Minority Ownership") in Radio Ownership Comments, Appx. 1, pp. 10-12. That appears to be the fortunate result of public-spirited corporate stewardship by two broadcast companies, Clear Channel and Infinity, which included minorities at the earliest stages of the process of station spinoffs. Id.; see also Initial Comments, pp. 46-47. The new rules are unlikely to generate many spinoffs, however.

51/ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second R&O and Third NPRM), 17 FCC Rcd 24018, 24127 (2002) (Separate Statement of Chairman Michael K. Powell).

52/ See Detroit Hearing Transcript, Testimony of Janine Jackson, Fairness and Accuracy in Media, Tr. 7-8; Verna Green, Black Chamber of Commerce, former President, WLJB, Tr. 12-13; Peter Dicola, Director of Economic Analysis, Future of Music Coalition, Tr. 18.

53/ See EEO Supporters Comments in Docket 98-204, supra, p. 53 n. 124 (reporting that 52% of minorities in radio work at minority owned stations).

54/ In 1999, the NAB stated that it did not oppose MMTC's proposal to restrict eligibility for intact sales of grandfathered clusters to socially and economically disadvantaged businesses ("SDBs"). The NAB reiterated that position in its Reply Comments. However, one day before the record closed in this proceeding, the NAB withdrew its support for this proposal. We responded the next day, although we are not sure the Commission reviewed our response before it issued the Report and Order. See p. iv n. 10 supra and pp. 9-10 and ns. 70 and 76 infra.

proposals. Several parties either supported our proposals55/ or specifically endorsed substantial efforts to promote minority ownership.56/ Yet the Report and Order contained no mention of the existence of eleven of our fourteen proposals:57/

- One proposal, relating to the sales of grandfathered clusters intact, was diluted in a way that is likely to render it virtually meaningless.58/
- Another proposal, seeking a ban on race and gender discrimination in broadcast transactions, was postponed for reasons that unfortunately recall a bygone era.59/
- One proposal was postponed for what could be many months, with no explanation of why it could not be addressed now.60/
- Five proposals, aimed primarily at racial diversity in ownership, were not mentioned at all.61/
- Six proposals, aimed generally at all forms of diversity in ownership, also were not mentioned.62/

Although the Report and Order appears to fit a long pattern of Commission neglect of civil rights issues in rulemaking proceedings,63/ we are ever optimistic that the Commission will take corrective steps. If the Commission needs additional information in order to review our

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55/ One of our proposals, seeking staged implementation of any new regulations, was simultaneously and independently put forward by Paxson Communications. See Paxson Communications Comments (January 2, 2003), pp. 6-14. See pp. 24-25 and n. 143 infra. Another proposal, urging the use of JOAs (joint operating agreements ("JOAs") rather than JSAs or LMAs, was initially advanced by CWA. See pp. 22, 31-32 infra.

56/ See generally Comments of NABOB (January 3, 2003) and Comments of NOW (January 2, 2003); see also Comments of CWA (January 2, 2003), pp. 59-62; Comments of UCC (January 2, 2003), pp. 17-19 and 55-56; Comments of AFL-CIO (January 2, 2003), pp. 23-25; Comments of National Association of Hispanic Journalists (January 2, 2003), pp. 6-9; Comments of Entravision Holdings, LLC (January 2, 2003), pp. 4-10.

57/ The Commission was intimately familiar with these proposals. During the comment period, we met with each commissioner and with 17 members of the staff, for a total of 20 meetings. See MMTC ex parte letters of November 12, 2002, January 30, 2003, February 10 and 12, 2003, March 3, and 10, 2003, and May 5, 15, 20 and 30, 2003. Every meeting request we made was granted, and no meeting was perfunctory or nonsubstantive.

58/ See pp. 8-10 infra, explaining that our proposal to establish SDBs as the eligible class of buyers was rejected in favor of the far more dilute "small business" classification.

59/ See pp. 10-12 infra., discussing Commission's decision to defer consideration of a policy banning race and gender discrimination in broadcast transactions until it can determine whether a nondiscrimination requirement would impose "any direct or inadvertent effects on the value and alienability of broadcast licenses" (Report and Order, ¶52).

60/ See pp. 13-14 infra.

61/ See pp. 14-19 infra (discussing omission of any reference to proposals that would have, inter alia, incentivized the sale, incubation, sharing of time and financing of stations to be acquired by SDBs).

62/ See pp. 19-28 infra (discussing omission of any reference to our proposals for mathematical touchstones for diversity, zero tolerance for ownership rule abuse, use of JOAs as an alternative to LMAs and JSAs, opening FM spectrum for new entrants, staged implementation of deregulation, and market-based diversity credits as an alternative to voice tests).

63/ See Initial Comments, pp. 24-39, for the Commission's history of repeatedly ignoring, shortchanging and postponing action on minority ownership proposals.

proposals, the Commission is respectfully requested to so notify us and we will supply whatever is needed.[64/]

II. The Commission Should Reexamine Several Proposals To Promote Diversity

A. The Commission Should Reconsider Its Rejection Of Our Proposal For Cluster Spinoffs to Socially And Economically Disadvantaged Businesses

We proposed a procedure under which the seller of a grandfathered cluster would not have to break it up if it were sold to an SDB.[65/] The Commission adopted a provision for transferring a grandfathered cluster intact, but then decided that small businesses, rather than SDBs, would constitute the class of eligible buyers.[66/] Unfortunately, the Commission's definition of "small business" is inherently flawed, because the Commission does not know how many small businesses there are, nor what might be the demographic breakdown of small businesses.[67/] It actually appears that 88% of radio broadcasters would qualify as small businesses under the FCC's definition, and only about 4.5% of these would be minority owned.[68/]

64/ The Commission rejected several parties' proposals by treating them as falling outside the scope of the proceeding. Report and Order, ¶¶623-632. If the Commission regards any proposal we have advanced as falling outside the scope of the proceeding, we respectfully request that such proposal either be placed in the appropriate active docket, or that it be treated as a petition for rulemaking, be assigned an "RM" number, and be placed on public notice as provided by 47 C.F.R. §1.403.

65/ See Initial Comments, pp. 107-109.

66/ Report and Order, ¶¶488-490.

67/ Report and Order, Appx. I, Initial Regulatory Flexibility Analysis, ¶7, estimating that about 10,427 of the 10,945 commercial radio stations meet the SBA's small business definition of $6 million or less in annual receipts, but adding:

> We note, however, that many radio stations are affiliated with much larger corporations with much higher revenue, and that in assessing whether a business concern qualifies as small under the above definition, such business (control) affiliations are included. Our estimate, therefore likely overstates the number of small businesses that might be affected by any changes to the ownership rules (fns. omitted).

Of course most (not just "many") radio stations are part of "much larger corporations with much higher revenue." In a largely consolidated industry, the SBA's small business definition is meaningless. See also Ofori Statement, §2.

68/ Id. Unfortunately, it seems as though the SDB definition in Senator McCain's Telecommunications Ownership Diversity Act of 2003, S.267 (introduced January 30, 2003, and aimed at restoring much of the tax certificate policy) is also unlikely to provide relief to a class in which minorities are significantly represented. See Ofori Statement, §2.

The cluster initiative has been questioned by Commissioner Adelstein on the basis that it will be rarely used.69/ On the other hand, the NAB maintains that even this modest initiative is too much.70/ For our part, we could support this initiative if it were designed correctly. It is unacceptable, in a nation 26% minority, for the Commission to hold out, as its sole initiative to promote minority ownership,71/ a plan whose eligible class is only 4.5% minority.

Certainly "small business" is not the right paradigm, since it includes all businesses of a certain size, most of which have never experienced any difficulty in securing access to capital. For example, a company owned by the child of a billionaire could qualify as a small business, but that company would not qualify as an SDB.

The record did not show a need for aid to small businesses generally. Instead, it showed a need for assistance to minority businesses specifically.72/ Thus, the Commission should develop its own definition of SDBs that will focus on those businesses, particularly minorities,

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69/ See Dissenting Statement of Commissioner Jonathan Adelstein, p. 23. To be sure, the infrequency of application of a civil rights initiative is no reason not to undertake the initiative, as long as the initiative is not held out as the sole remedy. At times, a program's infrequency of application is invoked as a reason to eliminate the program. See, e.g., Brewer v. West Irondequoit Central School District, 212 F.3d 738, 743 (2d Cir. 2000) (Parker, J., concurring) (doubting that a small inter-school district transfer plan could survive judicial scrutiny, since during 35 years that the plan was in effect, the Rochester, NY school district minority population increased from 25.6% to 80% while the percentage of White students in participating suburban districts stood at between 85% and 92%. Judge Parker concluded that "it is extremely difficult to see how this program has had any meaningful impact" on school integration). The perception that it is not worth saving a modest program also helps explain the Commission's 1985 repeal of the worthy but seldom-used Clear Channel eligibility criteria (favoring minority applicants for certain new AM facilities). Deletion of AM Acceptance Criteria in Section 73.37(e) of the Commission's Rules (R&O), 102 FCC2d 548, 558 (1985), recon. denied, 4 FCC Rcd 5218 (1989) ("Clear Channel Repeal") (holding that a "sounder approach" than eligibility criteria is to use distress sales and tax certificates to promote minority ownership. Only thirteen minority owned stations had been created during the two years when the policy was in effect. Id. at 555.) Ironically, civil rights initiatives are also abandoned because they appear to be too successful, as happened when the tax certificate policy was repealed in 1995. See Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, §2, 109 Stat. 93, 93-94 (1995).

70/ One day before the record closed, the NAB filed a letter objecting to our proposal because "smaller owners who may not be able to locate minority or female purchasers that are able to pay full value for station clusters should not be forced to suffer financially to achieve these worthy goals." Letter to Hon. Michael K. Powell from Jack N. Goodman, Esq., May 29, 2003; compare NAB Reply Comments (February 2, 2003), p. 44 n. 79 (although it "would go further, so that station owners would be allowed to transfer properly formed station combinations freely to any purchaser (see NAB's Comments at 83-84) NAB does not oppose MMTC's proposal.") The NAB's May 29, 2003 objection was not well taken. See Ofori Statement, §3 (explaining that minorities actually pay more than others for stations because "[f]irst, the financial market discriminates against minorities by forcing them to sign personal guarantees, post excessive collateral, and accept higher rates of interest. Second, sellers very often require minorities to offer more money because of the false perception that minorities are unlikely to close or due to the buyer's relative inexperience and lack of a long history of successful closings. Third, simply to get their feet in the door and have brokers return their phone calls or seek them out, minorities must develop a reputation for paying generously for properties" (fn. omitted)).

71/ See Report and Order, ¶51 (stating that this initiative will result in "greater participation in communications markets by small businesses, including those owned by minorities and women[.]") The initiative is discussed in a section entitled "Minority and Female Ownership Diversity," which in all other respects actually is devoted to postponing or rejecting proposed minority and female ownership initiatives. Id., ¶¶46-52.

72/ See Initial Comments, pp. 29-34 (discussing numerous research studies produced by NTIA and the Commission itself).

that tend to experience difficulty securing access to capital.73/

Finally, we urge the Commission to adopt a corollary to its cluster sales policy that would increase the frequency with which the procedure is used: the Commission should exempt from attribution, under its equity-debt plus ("EDP") policy,74/ seller financing which would permit an SDB to acquire a grandfathered radio cluster intact.75/ SDBs often have difficulty accessing capital; thus, seller financing is often an essential tool in enabling SDBs to grow.76/

B. The Commission Should Declare Now That Race And Gender Discrimination In Broadcast Transactions Violates The Law

In our Comments, we proposed a rule against discrimination in broadcast transactions.77/ Our proposal would require only that the seller check a box on a Form 314 or Form 315.78/ The effect would be that a seller could not indulge invidious race or gender stereotypes or outright prejudice in deciding which qualified buyers to solicit and consider.79/

The proposal did not require even a slight reorganization of the way broadcast properties are sold. We did not propose an affirmative recruitment plan analogous to Section 73.2080(b) and (c) of the broadcast EEO rule; instead, we proposed only a nondiscrimination rule analogous to Section 73.2080(a) of the broadcast EEO rule. Further, the customary protections of

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73/ Letter to Chairman Powell from David Honig, May 27, 2003, p. 2 n. 1 ("the Commission could follow any of several interim approaches to rendering SDB eligibility determinations. For example, the Commission could draw upon the record compiled in the six Section 257 studies completed in 2000; or it could review transactions case by case based on transferee's individualized showings of social and economic disadvantage; or it could consult with the Treasury Department in adopting an interim eligibility policy. The task of tying down the precise definition of a qualifying SDB is not so daunting that it should prevent the Commission from adopting the SDB Transfer Option as part of the forthcoming Report and Order.")

74/ See Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (R&O), 14 FCC Rcd 12559, 12573-91 ¶¶26-65 (1999) (subsequent history omitted) (adopting EDP rule).

75/ A related proposal is advocated at pp. 17-19 infra (discussing grandfathering of nonattribution of EDP interests in SDBs). The Commission should reserve the right to require assurances, by certification or otherwise, that the loan documentation was consistent with industry norms and that the seller is fully insulated operationally from the buyer.

76/ We do not agree with the NAB that SDBs would have difficulty paying fair market value for grandfathered clusters, or buying anything else they are given a chance to buy. See n. 70 supra. Nonetheless, we do recognize that the availability of seller financing would make such acquisitions easier for SDBs to carry out. Thus, facilitating seller financing would be responsive to the NAB's objection.

77/ Initial Comments, pp. 115-120 and (in more detail) April 28, 2003 Letter, pp. 11-19.

78/ Initial Comments, pp. 120; see also id., pp. 119-120 n. 199 (contending that certification is sufficient, given the sophistication of media brokers and counsel).

79/ See April 28, 2003 Letter, p. 18 (citing, as examples of pretextual and stereotypical excuses not to solicit or consider qualified minority potential purchasers, the belief that "minorities are only qualified for, or only interested in, urban or Spanish stations" and that "minority and woman-owned companies might not observe transactional confidentiality and that they are unqualified to close a transaction.")

confidentiality, present in all broadcast transactions, would still be observed in all instances. Finally, legitimate nonracial, non-gender selection criteria could still be used to choose where to solicit potential buyers and where to draw the line between serious prospects and tire kickers.80/

It is a tribute to the goodwill of the broadcasting industry that our proposal was unopposed.81/ We understand this to be the first occasion when no opposition surfaced after a federal authority was asked to adopt a nondiscrimination rule or statute. Unfortunately, that wasn't good enough:

> While such a rule is worthy of further exploration, we decline to adopt a rule without further consideration of its efficacy as well as any direct or inadvertent effects on the value and alienability of broadcast licenses. We see merit in encouraging transparency in dealmaking and transaction brokerage, consistent with business realities. We also reiterate that discriminatory actions in this, and any other context, is contrary to the public interest. For these reasons, we intend to refer the question of how best to ensure that interested buyers are aware of broadcast properties for sale to the Advisory Committee on Diversity for further inquiry and will carefully review any recommendations this Committee may proffer. As soon as the Commission receives authorization to form this committee we will ask it to make consideration of this issue among its top priorities.82/

We do not believe the Commission meant this paragraph to read the way it literally reads. Self-evidently, nondiscrimination does not adversely impact the "value and alienability" of broadcast licenses: rather, it is discrimination that has these consequences. Discrimination artificially reduces the size of the pool of potential buyers, thereby depressing demand and reducing property values.

The real estate industry's experience in the wake of the 1968 Fair Housing Act showed that, notwithstanding the predictions of segregationists, nondiscrimination in the sale of housing does not reduce property values.83/ And while White homeowners sometimes do refuse to sell

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80/ See April 28, 2003 Letter, p. 17. Examples of acceptable criteria could include, inter alia, company size (i.e., for stock deals), geography, format specialization (as an affirmative factor for including a company in a solicitation list, but not as a stereotype to exclude a company from a solicitation list), financial qualifications, and ability to close the transaction.

81/ See also p. 44 and n. 215 (discussing broadcast industry's participation in Grutter).

82/ Report and Order, ¶52 (emphasis supplied).

83/ Douglas S. Massey & Nancy Denton, American Apartheid, Segregation and the Making of the Underclass (1993), p. 95 (noting that while many Whites believe that property values fall once African Americans integrate a neighborhood, "evidence suggests the opposite, at least during the transition process.")

to minorities,84/ there is no evidence that Whites would not alienate their homes if they had to consider minority purchasers.

The Commission's policies against restraints on alienation would actually militate in favor of a nondiscrimination policy. The Commission frowns on arrangements under which regulatees impose on themselves irrational limitations on the scope of the eligible class of purchasers of their facilities.85/ A nondiscrimination rule would preclude the most irrational of such regulatee-imposed limitations.

A nondiscrimination rule will offer much needed protection to minority entrepreneurs at the very time -- the onset of deregulation -- when they need it most. Such a rule would offer considerable comfort to investors and capital providers, who would thereafter be more secure that minorities and women, on the basis of race or gender, will no longer be kept unaware of potential deals.86/ Capital flows to opportunity, and the starting point for opportunity is nondiscrimination.

Above all, this is a moral issue -- a question of right and wrong. There is no reason to take up the Diversity Committee's time with this most straightforward of matters.

The Commission erred by not doing more; indeed, the Communications Act requires the Commission to do more.87/ It can correct this error now by declaring, unequivocally, that race and gender discrimination in the sale of a broadcast station is against the law and will be prosecuted assiduously.

84/ See Alex M. Johnson, Jr., "Shaping American Communities: Segregation, Housing and the Urban Poor: How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods," 143 U. Pa. L. Rev. 1595, 1620-21 (May, 1995) (explaining that even when Whites move out of a neighborhood, they still wish to maintain friendships with their to-be-former neighbors (whose children may be their children's friends) and thus avoid the loss of friendship that the neighbors "can impose on the allegedly 'traitorous' white neighbor who sells her home to a Black.") Fortunately, broadcasters seldom have this motive for discrimination. Broadcasters almost surely are less concerned about what their former competitors think than homeowners are concerned about what their former neighbors think.

85/ See, e.g., Applications of Advanced Mobile Phone Service, Inc., 53 RR2d 1127 (1983) (voiding partnership agreement's restriction against alienation to non-wireline carriers).

86/ See p. 3 supra; see Ofori Statement, §1.

87/ See 47 U.S.C. §151 (1996) (creating the Commission to "make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service[.]" (new language added in the Telecommunications Act of 1996 underscored)). Although the 1996 amendment to Section 151 is not self-executing, the Commission has not yet initiated a proceeding to implement the amendment.

C. The Commission Should Adopt Incentive Plans Aimed At Promoting Racial Diversity In Media Ownership

In our comments, we proposed six race-neutral rule waivers and incentive initiatives. One was mentioned only in passing and referred to the Diversity Committee, and the other five were neither mentioned nor ruled upon. Two proposals, first advanced by MMTC in 1999 and tabled by the Commission in 2001 for further study, were among those not mentioned in the Report and Order.[88/] Another proposal, the subject of an NPRM issued eleven years ago during the Sikes administration and still pending, was also not mentioned.[89/]

For a generation, the Commission has promoted diversity with market-based incentives. The tax certificate program, the Top 50 policy, the distress sale policy, and the Mickey Leland Rule are examples that we have sought to build upon with our proposals.[90/] Our incentive proposals, and their fate in the Report and Order are described briefly below.

1. Structural Rule Waivers for Selling Stations to SDBs

In our Initial Comments, we stated:

> With the possible exception of lack of access to capital, the unavailability of quality stations to buy is the single greatest barrier to the growth of minority owned broadcast companies. Therefore, the single most important incentive the Commission could create is one that would allow a company to conclude an otherwise-premature transaction if it sells stations to socially and economically disadvantaged businesses.[91/]

The Commission referred this proposal to the Diversity Committee,[92/] an action that probably renders the proposal largely moot.[93/] Most of the major transactions to which this proposed initiative could be applied are likely to occur in the forthcoming year. It is improbable

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88/ These include structural rule waivers for financing construction of an SDB's unbuilt station, and grandfathering of nonattribution of EDP interests in SDBs. See discussion at pp. 16-19 infra.

89/ See p. 15 infra.

90/ These policies, and more generally the use of incentives in FCC diversity jurisprudence, are discussed in the Initial Comments, pp. 15-16 and n. 25.

91/ Initial Comments, p. 103.

92/ This was one of thirteen proposals referred to the Diversity Committee. The other twelve were never directed to the Commission, since they were nonregulatory in nature. See "Twelve Minority Ownership Solutions," in MMTC, "Background Materials: Omnibus Media Ownership Proceeding Stakeholders Meeting, U.S. Department of Commerce, November 6, 2002 (cited in the Report and Order, ¶49 and n. 76).

93/ See Letter to Hon. Michael K. Powell from David Honig, May 15, 2003 ("[w]hile we realize that the Commission might not rule on each of our proposals at this juncture, we feel strongly that it ought to do so....the consequences of this proceeding could render some of our proposals moot. Further, we believe the APA obliges the Commission to consider our proposals at the same time as it considers other parties' proposals.")

that the Commission can act on the Diversity Committee's recommendations before the most incentive-worthy transactions have already closed. This proposal is ripe for approval immediately so it can be used in the forthcoming wave of transactions.

2. Tolling Buildout Deadlines For Selling Expiring Construction Permits To SDBs

In 1998, Entravision Holdings LLC ("Entravision") submitted a petition for rulemaking (RM-9567; still pending) which sought to revise the construction permit expiration standard established pursuant to §§319(a)-(b) of the Communications Act and implemented in 47 C.F.R. §73.3598. Entravision proposed that the Commission allow holders of expiring construction permits to sell them to entities in which minorities own at least 20% of the equity, or to entities which commit to serve the programming needs of minority or foreign language groups for at least 80% of their operating time. We suggested a modification of Entravision's concept to make it applicable to all SDBs.94/ Further, we urged that Entravision's plan, as modified, "would be a far superior market mechanism for disposing of expiring permits than the current plan for automatic expiration. The proposal allows the Commission to quickly and efficiently place an expiring permit in the hands of those who the Commission has found are likely to promote diversity right now."95/ The plan would rescue the investments of permittees who had tried in good faith to build out their facilities, it would enhance the likelihood that the public will receive service on an expedited basis, and it would relieve the Commission of the time and expense of putting the allotment out for bids again.96/ By advancing diversity, lifting regulatory impediments facing broadcasters, reducing the Commission's workload, and promoting the rapid delivery of service to the public from a qualified applicant, the proposal is conceptually similar to the distress sale policy, which the Commission has operated successfully for 25 years.97/

This unopposed proposal has been pending for five years. In light of the Commission's huge application processing backlog, this proposal is especially timely and ripe for approval.

94/ Initial Comments, pp. 112-115.

95/ Id., p. 113.

96/ Id., pp. 113-114.

97/ See Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1978) ("1978 Policy Statement").

3. Structural Rule Waivers For Creating Incubator Programs

We urged the Commission to act on still-pending incubator plans developed in 1992 by Chairman Sikes and by NABOB. With constitutionally required modifications, these plans would allow a company to acquire more than the otherwise-allowable number of stations in a market if the company establishes a program that substantially promotes ownership by disadvantaged businesses.[98/] The incubator programs could encompass management or technical assistance, loan guarantees, direct financial assistance through loans or equity investment, training and business planning assistance.[99/]

Since this proposal carried the tentative endorsement of a former commission, it is not inconsequential. Eleven years after being put out for comment, and with no opposition, it deserves approval.

4. Bifurcation Of Channels For Share-times With SDBs

In a copiously detailed proposal in the radio ownership proceeding, MMTC proposed the creation of a new class of "Free Speech Stations."[100/] These stations would have at least 20 non-nighttime hours per week of airtime.[101/] They would be independently owned by small disadvantaged businesses,[102/] and they would be primarily devoted to nonentertainment programming.[103/] A Free Speech Station would share time on the same channel with a largely deregulated "Entertainment Station."[104/] A cluster owner that bifurcates a channel to accommodate a Free Speech Station and an Entertainment Station could buy another fulltime station in the market by taking advantage of Section 202(b)(2) of the Telecommunications Act,

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98/ Initial Comments, pp. 103-105. See Revision of Radio Rules and Policies (MO&O and Further NPRM), 7 FCC Rcd 6387, 6391 ¶21 (1992) ("1992 Radio Rules - Reconsideration") (concluding that "encouraging investment in small business and minority broadcasters is a goal worth pursuing. Minority broadcasters who have had difficulty acquiring the resources to become station owners could significantly benefit from such assistance"); see id., 7 FCC Rcd at 6391-92 ¶¶22, 24-25 for a discussion of the incubator proposal itself.

99/ 1992 Radio Rules - Reconsideration, 7 FCC Rcd at 6392 ¶¶24-25.

100/ Radio Ownership Comments, pp. 111-173. See also Initial Comments, pp. 106-107.

101/ Radio Ownership Comments, p. 118.

102/ Id., pp. 119.

103/ Id.

104/ Id., p. 118.

which allows for an exception to the local radio ownership rule when a new station is created.[105] That additional fulltime station would also be bifurcated into a Free Speech and an Entertainment Station. In this way, a cluster could grow steadily up to the limits allowed by antitrust law. Further, as a result of this plan, the number of sources and viewpoints available to the public would grow exponentially, and minority and SDB ownership would get a much-needed boost.

Seven years ago, the Commission promised to conduct a proceeding to implement Section 202(b)(2) of the Telecommunications Act.[106] The Free Speech Radio proposal offers the Commission its opportunity to honor its promise.

5. Structural Rule Waivers For Financing Construction Of An SDB's Unbuilt Station

In the 1999 television duopoly proceeding, MMTC proposed that:

> when a broadcaster provides an SDB with an equity/debt plus interest ("EDP Interest") that enables the SDB to build out an unbuilt permit, (1) the EDP Interest should be deemed nonattributable, and (2) the entity providing the EDP Interest (the "EDP Provider") should be reserved a place in line to subsequently duopolize or crossown another same-market station.
>
> SDBs are often highly motivated to build out unbuilt television or radio permits and thereby add a new independent voice to the community. Larger, same-market competitors often lack this motivation because they typically prefer to duopolize or crossown stations that are already on the air.
>
> SDBs wishing to build out (or acquire, then build out) an unbuilt permit could often benefit substantially from EDP Interests provided by a large broadcaster, especially one that understands the market. However, large broadcasters might hesitate to provide such an EDP Interest. It would be an attribution time bomb, set to explode once the unbuilt permit is built out. Furthermore, the EDP Interest, if attributable, could preclude the large broadcaster from acquiring another television station (or one or more radio stations) in the same market.
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> To resolve this dilemma, we propose that an EDP Interest be deemed nonattributable if it was provided to an SDB to build out, or acquire and build out, an unbuilt permit.

105/ Id., pp. 158-161. Section 202(b)(2) of the 1996 Telecommunications Act authorizes the Commission to allow an entity to own, operate or control more radio stations in a market than the number specified in 47 C.F.R. §73.3555(a)(2) "if the Commission determines that such ownership, operation, control or interest will result in an increase in the number of radio broadcast stations in operation." Channel bifurcation does indeed give rise to an increase in the number of stations, since each station in a share-time is a "radio station" under 47 C.F.R. §73.1715 (authorizing commercial share-time operations).

106/ Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership (Order), 11 FCC Rcd 12368, 12370 n. 2 (1996) (promising that "[t]he implementation of [Section 202(b)(2)] will be addressed in a Subsequent Notice of Proposed Rulemaking.")

> When the unbuilt station signs on, the number of independent local voices would increase by one, but might still be insufficient to make room for another duopoly or TV/radio crossownership. Anticipating that scenario, the Commission should also afford the EDP Provider a vested right to the processing of its applications to fill out its complement of duopolized or crossowned stations. This right would vest on the date the contract with the SDB is filed with the Commission. This vested right would provide the large broadcaster with the secure knowledge that its public spiritedness in making a potentially risky investment in an SDB's unbuilt permit will be rewarded with a guaranteed opportunity to acquire a full complement of local properties.[107/]

This EDP Interest's nonattribution, coupled with this vested right to grow in the market, would powerfully incentivize companies to provide equity and debt to SDBs in a manner that promotes diversity. Nonetheless, in 2001, the Commission deferred this proposal because it had not yet reviewed the Section 257 studies.[108/]

Two years have since elapsed; thus, there is no longer any reason not to grant this proposal. In light of the Commission's application processing backlog, this proposal could not be more timely now.

6. Grandfathering Of Nonattribution of EDP Interests in SDBs

In the 1999 ownership attribution proceeding, MMTC proposed the grandfathering of the nonattributable nature of EDP Interests in SDBs, irrespective of whether the entity providing the EDP Interest (the "EDP Provider") subsequently acquires other properties which otherwise would cause the EDP Interest to be attributable to the EDP Provider. MMTC contended that while the EDP concept was "a well-intentioned effort to discourage fraud while also encouraging broadcasters to invest in or lend to small concerns" the new EDP rules "have an unintended consequence: they may discourage broadcasters from providing an EDP interest to any SDB anywhere in the country, irrespective of whether the potential EDP Provider is presently a same-market media entity or a major program supplier to the SDB."[109/] MMTC explained that potential EDP providers, which are among the nation's largest broadcasters,

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107/ MMTC Television Ownership Reconsideration Petition, pp. 17–18; also in Initial Comments, pp. 109-110.

108/ Television Broadcasting - Reconsideration, 16 FCC Rcd at 1078 ¶33.

109/ Petition for Partial Reconsideration and Clarification of the Minority Media and Telecommunications Council, MM Docket No. 94–150 (Ownership Attribution) (filed October 18, 1999) ("Attribution Petition for Reconsideration"), p. 2. See also Initial Comments, pp. 110-112.

> usually find it disadvantageous to hold small, potentially attributable interests in markets not critical to their growth strategies. These nonstrategic interests could become attribution time bombs that would explode upon a sizable merger or acquisition. In positioning itself for future acquisitions, a broadcaster will not want to laden its portfolio with these time bombs that would make its bid for an acquisition target noncompetitive with the bids of other companies.
>
> An EDP Interest in an SDB would be an exceptionally volatile attribution time bomb. This EDP Interest could become attributable if the acquisition target owns another station in the SDB's market (a "Potentially Overlapping Station"). Thus, if an EDP Provider wishes to bid for this acquisition target, the EDP Provider would be compelled to structure its bid either to exclude or spin off the Potentially Overlapping Station, or to reduce or extinguish its EDP Interest in the SDB. These requirements would increase the cost, risk and time for such an acquisition, making the EDP Provider's bid for the acquisition target relatively less attractive to both the EDP Provider and the target. The opportunity costs of a foregone merger, or the merger's higher transactional costs if undertaken, would likely far exceed the profit potential of any EDP Interest in any SDB. Realizing this, most large broadcasters would probably not go to the trouble of providing EDP Interests to SDBs.
>
> The nonstrategic nature of EDP Interests in SDBs helps explain why these interests are relatively rare even now. Converting them into attribution time bombs could wipe them out entirely, rendering a potentially valuable source of debt and equity unavailable to SDBs. This is the opposite of the small business investment climate the Commission wants to foster.110/

MMTC urged the Commission to cure this problem, and thus avoid any inadvertent disincentivizing of EDP interests in SDBs, by grandfathering otherwise nonattributable EDP interests in SDBs in situations where four conditions are met:

1. the EDP Provider merges with, acquires, or is acquired by a company unrelated to the company holding a nonattributable EDP Interest in an SDB (an "Unrelated Transaction");
2. the Unrelated Transaction occurs at least a year after the EDP relationship was formed;
3. the Unrelated Transaction would otherwise cause the EDP Provider's EDP Interest in the SDB to become attributable; and
4. the EDP Provider and the SDB make an affirmative showing that the EDP Provider does not exercise undue influence over the SDB.111/

This plan would do much to expand SDBs' access to capital. Nonetheless, in 2001, the Commission deferred this proposal because it had not yet reviewed the Section 257 studies.112/

110/ Attribution Petition for Reconsideration, pp. 1-2; Initial Comments, p. 111.

111/ Attribution Petition for Reconsideration, p. 3; Initial Comments, p. 112.

112/ Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (MO&O and Order on Reconsideration), 16 FCC Rcd 1109-1110 ¶24 (2001).

Two years have passed, and there is no reason not to grant this proposal.[113]

D. The Commission Should Rule On Six Proposals That Would Promote Diversity and Competition Generally

Six regulatory proposals whose scope reaches far beyond the question of minority or SDB ownership were not mentioned in the Report and Order.

1. Mathematical Touchstones For Diversity

The Report and Order included a "diversity index" ("DI"),[114] which the Commission describes as "a method, based on citizen/viewer/listener behavior, of characterizing the structure of the 'market' for viewpoint diversity. We use the DI as a tool to inform our judgments about the need for ownership limits."[115] The idea of a diversity index was mentioned in an address given by Chairman Powell after the due date for comments in this proceeding.[116] However, the NPRM itself did not mention that a diversity index was contemplated.[117]

We offered two formulas suitable for crafting and implementing rules to promote diversity. Our "Tipping Point Formula" established how the Commission could ensure that local radio markets could preserve independent owners. This formula was based on the premise that independent owners each need determinable and quantifiable revenue streams in order to stay afloat and provide service to the public. The formula acknowledges the existence of a "tipping point" in the distribution of radio revenue in a market between cluster owners and independents. When the combined revenues of a market's cluster owners exceed this tipping point, the independents can no longer survive. By identifying this tipping point, the formula provides a rational basis for determining whether a transaction would limit diversity.[118]

113/ The Commission held that the attribution rules themselves were outside the scope of this proceeding. Report and Order, ¶629. Nonetheless, this proposal addresses a matter that the Commission does regard as falling within the scope of this proceeding: the treatment of certain types of interests under the attribution rules. See, e.g., id. at ¶¶316-325 (discussing attribution of JSAs).

114/ Report and Order, ¶¶391-431.

115/ Id., ¶391.

116/ See Remarks of Chairman Michael K. Powell, Columbia Law School, January 16, 2003 (discussing desirability of creating an "HHI for Diversity").

117/ 2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277 (Notice of Proposed Rulemaking), 17 FCC Rcd 18503 (2002) ("NPRM").

118/ MMTC Comments in MB Docket 01-317 (May 8, 2002) ("Radio Ownership Reply Comments"), pp. 22-27.

Our "Source Diversity Formula" expresses consumers' utility derived from marginal increases in source diversity.[119/] The Source Diversity Formula is based on the premise that increases in consumer utility flow from their access to additional sources, with diminishing returns to scale.[120/] We pointed out, however, that neither our formula, nor any other social science formula that attempts to measure diversity, could be applied in practice before it is field-tested -- a task which would take several months.[121/]

Although the Commission acknowledged that there is pressure on small broadcasters to sell out to large ones,[122/] it did not consider whether our Tipping Point Formula might solve this problem. Nor did the Commission consider our Source Diversity Formula as a basis for measuring diversity.[123/]

The Commission has a continuing obligation to know the long term impact of its rules. Thus, on reconsideration, it should consider each metric that could be useful in ascertaining whether the rules are helping or harming the public.

119/ See Diversity and Competition Supporters Reply Comments (February 3, 2003) ("Reply Comments"), pp. 17-24, and April 28, 2003 Letter, pp. 6-7 and n. 15.

120/ For example, there is a very significant marginal increase in a consumer's utility attributable to the fourth independent source, but a negligible increase in utility from the 400th source. See Reply Comments, p. 20.

121/ April 28, 2003 Letter, p. 6. Indeed, the Diversity Index itself has not been field-tested, and thus its use to validate the structural rules is premature.

122/ The Commission found that:

> Several commenters express concern that, in markets with a high level of concentration, small radio firms may be forced to "sell out" to group owners. Specifically, the concern is that, in a concentrated market, dominant radio station groups can exercise market power to attract revenue at the expense of the small owner. As a result, the small owner has greater difficulty obtaining the revenue it needs to develop and broadcast attractive programming and to compete generally against the dominant station groups.

Report and Order, ¶229 (citing, inter alia, Radio Ownership Comments, pp. 23-24, 45). However, the Commission failed to evaluate our specific proposal to cure this problem.

123/ Not only did the Commission fail to consider our Source Diversity Formula as a measurement of source diversity, it held that there is an "explosion of programming channels now available in the vast majority of homes today, and in the absence of evidence to the contrary, we cannot conclude that source diversity should be a policy goal of our broadcast ownership rules." Report and Order, ¶45. This finding was certainly called into doubt by the two million individual commenters who valued source diversity enough to personally write to the FCC about it. That extraordinary fact alone proves that the Commission was wrong in suggesting that there is no evidence that consumers value source diversity. Indeed, if source diversity were not a goal of regulatory policy, there would be no reason, in a community too small to capture the attention of our overworked antitrust regulators, why ownership of all media by a single person should not be permissible. Presumably that person would ask the public to trust him to include diverse viewpoints on the air -- at least until license renewal time is over. That is frightening.

2. Zero Tolerance For Ownership Rule Abuse

Over much of its life, the Commission has been faced with endemic abuse of the structural ownership rules.124/ It is not hard to discern why: Commission enforcement resources are limited. Abuse is easy to conceal. Rulebreaking can be extremely lucrative.

When structural rules are relaxed, it becomes even more critical for the Commission to hold the line on abuse. Thus, we asked the agency to adopt a "zero tolerance policy." We asserted that the integrity and survivability of the structural ownership rules depend on strict enforcement.125/

Recently, the Commission addressed another area of law in which the temptation to cheat is great and the risk of getting caught is low: equal employment opportunity. In the 2000 EEO Report and Order, the Commission adopted elements of the proposed zero tolerance policy advocated by civil rights organizations participating in that proceeding.126/ In the MD/DC/DE Broadcasters case, the Court said nothing that casts doubt on zero tolerance EEO enforcement.127/

The Report and Order is silent about the consequences of abuse of its new regulations. Members of the public are afforded no comfort that the Commission will strictly hold the line on these rules in practice, and regulatees are provided no guidance about the extent to which the Commission will tolerate departures from strict compliance.

No structural rulemaking is complete without a discussion of enforcement and remedies. Given the long history of structural abuse in the absence of strict regulation, the Commission should adopt our zero tolerance proposal.

124/ See Initial Comments, p. 125 and ns. 208 and 209 (citing authorities).

125/ Id., pp. 123-127. See also Edwin Edwards, Sr., 16 FCC Rcd 22236, 22262 (Statement of Commissioner Michael J. Copps, Dissenting in Part and Approving in Part) (subsequent history omitted) (contending that certain challenged transactions between one company and another with which it operates stations under LMAs have "stretched the limits of the Commission's local television ownership rules" such that "[e]ach transaction moves the line to which all of our licenses are subject. And this decision moves it further still.")

126/ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Report and Order), 15 FCC Rcd 2329, 2384-86 ¶¶135-40 (2000), recon. denied, 15 FCC Rcd 22548 (2000), reversed on other grounds sub nom. MD/DC/DE Broadcasters Ass'n. v. FCC, 236 F.3d 13, rehearing denied, 253 F.3d 732 (D.C. Cir. 2001), cert denied, 122 S.Ct. 920 (2002) ("MD/DC/DE Broadcasters").

127/ Cf. MD/DC-DE Broadcasters, 236 F.3d at 18 (rejecting contentions that the new EEO rule "arbitrarily and capriciously increases the 'regulatory burden' on stations[.]")

3. Use Of JOAs As An Alternative To LMAs and JSAs

The Commission found that LMAs and JSAs adversely impact diversity; thus, it required ownership attribution of most JSAs and LMAs.128/ While this step promotes diversity, it also reduces the options available to financially troubled facilities seeking to survive. If an LMA or a JSA is no longer a viable option, the only choice available to the owner of a financially troubled station would be to sell the station to a company that can accept attribution.129/

The Communications Workers of America (CWA) offered a solution to this dilemma: joint operating agreements ("JOAs"). In the newspaper industry, JOAs have often proven instrumental in rescuing independent competing voices in a community.130/ We strongly endorsed CWA's idea,131/ which was the only alternative to JSAs and LMAs offered by any party.132/

Allowing and encouraging JOAs was a very significant proposal. A genuine JOA leaves each station's program creation, program organization and distribution, and sales strategy and implementation firmly in the hands of the station's licensee. At the same time, a genuine JOA allows both stations to take advantage of operational synergies for non-program, non-sales related functions, such as accounting, engineering, and physical plant management.

On reconsideration, we urge the Commission to hold that a genuine JOA is not attributable. As a protection against abuse (i.e., a JOA that is really a JSA or an LMA in disguise, to evade attribution), the Commission should require the parties to JOAs to make JOA agreements accessible on CDBS.

128/ Report and Order, ¶¶316-325.

129/ Indeed, the Commission's abandonment of the sales solicitation feature of its failed/failing/unbuilt stations policy actually encourages duopolization and discourages independent operation. See pp. 32-36 infra.

130/ See CWA Comments, January 2, 2003, pp. 4-5 and 48.

131/ Reply Comments, pp. 15-16.

132/ JOAs are being used in two television markets: Nashville, TN and Tallahassee, FL. See discussion in Reply Comments, p. 15 n. 30.

4. Opening FM Spectrum For New Entrants

The Commission has systematically broadened spectrum availability as a means of balancing consolidation with new entry.133/ Thus, in our Comments, we proposed three methods by which the FCC could open the FM radio spectrum to new entrants: (1) create two new classes of FM stations suitable for serving small communities; (2) perform a comprehensive engineering search of the FM spectrum to identify the most-needed new drop-in opportunities; and (3) replace FM station classes with pure interference-based criteria.134/

These are hardly radical proposals. Indeed, a recent study has demonstrated that third adjacent channel interference is no longer a significant source of harmful interference to FM radio stations.135/ This long-anticipated study opens the door to the potential creation of more low power and full power FM stations.

When the Commission allows more consolidated ownership of a resource, few countervailing steps are more logical than expanding the resource and opening it to new entrants. We hope that the absence of discussion of this subject in the Report and Order was just an honest mistake that the Commission will find it easy to correct on reconsideration.

5. Staged Implementation Of Deregulation, Together With A Negotiated Rulemaking

By implementing deregulation in stages, the Commission could measure the impact of deregulation while it is underway, and implement mid-course corrections when needed to protect diversity, competition, localism and minority ownership. Under our staged implementation

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133/ See, e.g., Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Allotments, Docket 80-90 (R&O), 94 FCC2d 152, 158 (1983) (noting that a "basic objective" of the Commission has been to provide "outlets for local expression addressing each community's needs and interests"); Television Channel Allotments (VHF Drop-ins) (NPRM), FCC 80-545, 45 FR 72902 (November 3, 1980) at ¶¶9, 12 ("any potential loss experienced [by incumbents] will be more than offset by the benefits of such a policy -- additional television service for the public...it is in the public interest to have a regulatory framework that permits the maximum number of signals that can be economically viable" (fn. omitted). A fine exposition of this approach is found in the separate statement of Chairman Fowler and Commissioner Dawson in the Low Power Television (R&O), 51 RR2d 476, 525 (1982):

> Low power television may not have the transmission capabilities of full broadcast television, but its capacity to provide televised programming that is directly responsive to the interests of smaller audience segments makes it truly unique in its ability to expand consumer choices in video programming. From this perspective, the power of these stations may be low, but their potential is enormous.

134/ See Initial Comments, pp. 128-141.

135/ Mitre Technical Report, "Experimental Measurements of the 3rd Adjacent Channel Impacts of Low-Power FM Stations" (May, 2003), pp. 156-57 (finding that advances in receiver technology have essentially eliminated the need for regulations governing third adjacent channel interference).

proposal, the Commission would implement its new rules over a ten year period in five two-year stages. In even numbered years, the Commission would use quantitative tests to measure diversity, competition, localism and minority ownership. If these tests showed ill health on any of these four factors, the Commission would take corrective steps in the odd-numbered years. If a subsequent even-year measurement showed continued ill health, the Commission could apply the brakes until market conditions change.136/

Paxson Communications, for decades a leading advocate and incubator of minority ownership, offered a staged implementation proposal that is conceptually similar to ours.137/

Our concept was designed to enable the Commission to use staged implementation schedule as a vehicle for promoting SDB ownership. For example, if a company wants to undertake today a transaction not approvable until Stage 3 of deregulation (six years hence), the company would make three divestiture or incubator pledges and earn approval of its transaction six years before it would become routinely approvable.138/

Staged implementation takes on heightened importance in light of the dramatic changes in industry ownership structure that will occur in the wake of the Report and Order. In his expert testimony, Kofi Ofori states:

> Staged implementation of the rules has been recommended by the Diversity and Competition Supporters and also Paxson Communications. This recommendation is justified by the fact that most minority owned companies are small, and few of them have a fulltime business planner on staff or on retainer. Indeed, only a few minority owned companies are large enough to employ a corporate comptroller fulltime. Consequently, when new ownership rules are announced by a regulatory agency, small companies generally will need more time than other companies to adjust their business plans and strategies, seek new sources of funding, and perform the extensive entrepreneurial work required to seek out and pursue new acquisition opportunities. These activities require extensive management time, and a small company is often preoccupied with just staying afloat day to day. They cannot "turn on a dime" when the FCC changes its rules. The Diversity and Competition Supporters have referred to this as "shock effect" and that characterization accurately captures what happens to small companies when regulatory change occurs overnight. This "shock effect" could be overcome if the FCC elected to deregulate gradually and methodically.139/

136/ Initial Comments, pp. 84-90.

137/ See Paxson Communications Comments, pp. 6-14.

138/ Initial Comments, pp. 82-115.

139/ Ofori Statement, §1.

Associated with our proposal for staged implementation was a proposal for a negotiated rulemaking.[140/] In a negotiated rulemaking, all stakeholders could work out their differences on such matters as market definitions and the structure of a staged implementation plan.

Staged implementation could not be more germane to this type of proceeding. As Commissioner Adelstein noted, "[g]iven the potential harms in overhauling these longstanding rules in such a dramatic fashion, I advocate an incremental approach that will show the public at each step how it will benefit."[141/]

If these rules were adopted in error, they are essentially irreversible.[142/] Thus, staged implementation is far preferable to relying on predictions that deregulation will work out fine -- predictions that could prove wrong.[143/] One could argue that the industry needs "relief" now, but the record contained nothing to suggest that staged implementation could not be structured in a manner designed to afford any necessary relief within a reasonable time.

Staged implementation would both comply with and advance the objectives of Section 202(h) of the Telecommunications Act.[144/] If a structural rule is found not "necessary in the public interest," staged implementation would be a prudent way to "modify" the rule as provided by Section 202(h).[145/] Further, if staged implementation were adopted, it would be a

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140/ See Initial Comments, pp. 145-147; Radio Ownership Comments, pp. 174-176.

141/ Dissenting Statement of Commissioner Jonathan Adelstein, p. 38. Commissioner Adelstein cited, in n. 79, Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309, 316 (7th Cir. 1994), in which the 7th Circuit declared that "caution in overturning a regulatory system that has been in place for many years strikes us as an adequate reason for an agency's deciding to continue the system in limited form for a brief period before decreeing total deregulation. Phased deregulation is common, practical, and sensible. Involving as it does judgmental considerations that are difficult to quantify, it is unlikely to flunk judicial review."

142/ See Prometheus Stay Order, pp. 2-3; see also Dissenting Statement of Commissioner Michael Copps, p. 8. The Commission has always been loath to require unwinds of acquisitions. See, e.g. Report and Order, ¶484 (finding that requiring divestitures of ownership combinations that do not comply with the new rules, would, inter alia, "be too disruptive to the industry.") Perhaps the most valid of axioms is the one that acknowledges that "possession is rather more than nine points of the law." Corporation of Kingston-upon-Hull v. Horner (Lord Mansfield, 1774); but cf. FCC v. FCCB, 436 U.S. 775, 802 (1978) (upholding the Commission's decision, upon promulgation of the newspaper/broadcast crossownership rule, to require divestitures in some markets where ownership concentration was particularly high).

143/ For this reason, it may be that "the wisest course is to liberalize the current rule at a pace that allows for all existing station combinations, but preserves the Commission's flexibility to exercise some control if increasing consolidation begins to have ill effects." Paxson Communications Comments, p. 14.

144/ Codified at 47 U.S.C. §161 (1996).

145/ See Initial Comments, pp. 99-101; Reply Comments, p. 30; April 28, 2003 Letter, p. 5. Nowhere in the legislative history of Section 202(h) is there an indication that Congress meant "eliminate or modify" to mean "eliminate all at once." Nor is there an indication that Congress intended the Commission to suspend its good judgment, or ignore the fruits of its own expertise, on the question of whether instantaneous implementation of massive changes in the marketplace would frustrate the very goals Congress sought to achieve in the legislation.

rule in its own right, and thus it would be subject to review every two years under Section 202(h).[146] If the staged implementation schedule is too lengthy, the Commission could tighten it in a subsequent biennial review. Consequently, although staged implementation could not get in the way of harmless or beneficial deregulation, it could prevent harmful deregulation.

The Commission should adopt staged implementation before a wave of transactions renders it largely moot. In doing, so, the Commission should convene a negotiated rulemaking to work out the implementation schedule and metrics under which the Commission can longitudinally measure diversity, competition, localism and minority ownership.[147]

6. Market-based Diversity Credits As An Alternative To Voice Tests

In our reply comments and in a subsequent letter, we proposed a system of market-based diversity credits as an alternative to voice tests. Under our proposal, a quantity of diversity credits would be given to SDBs, commensurate with the extent of their social and economic disadvantages. Diversity credits would also be given to the seller at the closing of a transaction that would result in greater structural diversity. If a transaction would add to concentration, the buyer would return a number of diversity credits to the Commission when the transaction closes. Finally, companies could buy or sell diversity credits to one another, thereby providing a market-based source of access to capital for SDBs.[148]

While this concept might seem unique, it is not new. A similar paradigm, in use for a decade at the EPA, has basically replaced much command-and-control environmental regulation with incentives, with promising results.[149]

146/ See Reply Comments, p. 31.

147/ Radio Ownership Comments, pp. 174-176; Radio Ownership Reply Comments, pp. 27-28; Initial Comments, pp 145-147.

148/ See Reply Comments, pp. 34-38; April 28, 2003 Letter, pp. 8-10.

149/ See, e.g., Robert N. Stavins, "Market-Based Environmental Policies", in Public Policies for Environmental Protection (1998); Robert N. Stavins, "What Can We Learn from the Grand Policy Experiment? Lessons from SO_2 Allowance Trading," 12 J. of Economic Perspectives 69 (1998). Professor Cass Sunstein's article, "Television and the Public Interest", 88 Calif. L. Rev. 499 (2000) explores how the environmental market-based paradigm could be applied to television programming. It is not a stretch to also apply this concept to television and radio ownership, as we have suggested.

One reason for having this rulemaking was that the Commission had difficulty justifying the use of voice tests.150/ Thus, a proposal whose adoption could supplant voice tests seems an odd candidate for exclusion from the Report and Order.

Diversity credits have at least six distinct advantages over voice tests:

First, diversity credits incentivize diversity. Voice tests lack this attribute.

Second, diversity credits disincentivize consolidation. On the other hand, voice tests merely set a ceiling on consolidation. In this sense, diversity credits also provide more flexibility than voice tests, which bar all consolidation beyond a certain point even if the potential harm from a quotum of additional consolidation is slight.151/

Third, diversity credits place on the beneficiaries of consolidation the responsibility of paying for the remediation of some of consolidation's ill effects. Diversity credits do this by requiring those who undertake a consolidating transaction to relinquish some credits. If they lack sufficient credits, they would buy them from companies that add to diversity.152/ On the other hand, voice tests transfer all of the social costs of consolidation onto the general public.

Fourth, diversity credits serve as a mechanism to provide access to capital to SDBs. Moreover, a company's access to capital through diversity credits is directly commensurate with that company's, or its transaction's, contribution to diversity. By stimulating the flow of capital to SDBs and new entrants, diversity credits are a powerful and focused engine for minority and SDB ownership.153/ Voice tests lack this feature.

Fifth, diversity credits capture the measure of diversity more precisely than an inherently approximate voice test. Voice tests use small integers as their units of measurement.

Sixth, diversity credits are easier for the Commission to administer than voice tests, since the use of bright line rules and waivers is minimized when the market is deployed as an engine to

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150/ Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148, 162 (D.C. Cir. 2002), rehearing denied (August 12, 2002) ("Sinclair").

151/ Some aspects of diversity credits are unavoidably arbitrary (e.g., how many credits should be afforded to which companies, and for which transactions). Nonetheless, not being market-based, voice tests are more prone to arbitrariness. See April 28, 2003 Letter, p. 9.

152/ See Reply Comments, p. 36.

153/ Minorities' lack of access to capital is discussed in the Initial Comments, pp. 32-37. As the Commission has recognized, "access to capital is the most critical limitation on minority participation in the industry." Revision of Radio Rules and Policies (R&O), 7 FCC Rcd 2755, 2770 ¶28 (1992).

advance national regulatory policy objectives.

Thus, on reconsideration, the Commission should consider whether diversity credits are a viable alternative to voice tests. Following the lead of the EPA, the FCC should invite economists to review the concept and tailor it to the FCC's specifications and needs.

III. The Commission Should Reconsider Some Of The Deregulatory Steps It Has Taken [154/]

A. The Commission Should Reconfigure Its Television Voice Tests To Reflect Only Those Voices That Americans Actually Receive

The NPRM sought comment on "whether the level of diversity that the public enjoys varies among different demographic or income groups" and, if there is a disparity in access to television signals, "how should we factor in that disparity in our diversity analysis?"[155/]

These were good questions, since fifteen percent of Americans cannot afford or receive cable or satellite programming.[156/] Thus, we asked the Commission to make media service to these families a necessary goal of structural regulation.[157/] In particular, we asked the Commission to base any voice tests on the signal count of stations actually received by these forty million Americans.[158/]

154/ We oppose many of the substantive deregulatory decisions reached in this proceeding, particularly the Commission's decisions to allow more TV-radio crossownership, more local television duopolies, and a higher national television audience cap. See Initial Comments, pp. 36-48. Other parties will address these widely debated issues, and we preserve them for appeal. We focus herein on three less publicized, but no less controversial deregulatory steps that should be revisited now.

One particular matter deserves attention: The Report and Order (at ¶280) provides that the Commission will rely on the Media Access Pro database, as prepared by BIA Financial Network, Inc., a private entity ("BIA"). BIA has constructed its database on the audience measurement data developed by Arbitron Co., another private entity ("Arbitron"). Neither of these entities make available to the public the information that would allow a party to determine whether a particular station is deemed by them to be in a particular radio market, the number of stations in such market, and what stations are "above the line" or "below the line." In order to not only access the information, but to make use of the information in required submissions to the Commission, a party must become a subscriber, which is quite expensive. Use of this information by a non-subscriber would constitute a violation of these entities' copyrights and expose applicants and potential applicants to liability. While this may not be a concern for large group owners, other parties, and especially new entrants and SDBs, may not be able to afford such expenses. The database is outstanding and BIA and Arbitron deserve full compensation for their efforts. Thus, if the Commission intends to require its regulated parties to rely on information developed by private entities, the Commission should ensure that this information is fully available (as it is not now) in the public domain or can be accessed and used at nominal cost to such parties.

155/ NPRM, 17 FCC Rcd at 18520 ¶48.

156/ See Initial Comments, p. 142 and n. 243 (citing Ninth Video Competition Report, 17 FCC Rcd 26901, 26975 (2002) (Appx B, Table B-1, Assessment of Competing Technologies).

157/ Initial Comments, pp. 142-145.

158/ See id., p. 145 ("[b]uilding upon its goal of universal telephone service, the Commission should adopt a goal of universal multichannel media and broadband services to all Americans. Until that goal is achieved, the Commission's structural rules should not be based upon a 'voice' test that includes voices unavailable to low income and rural families.")

Although the NPRM properly raised the issue, the Report and Order does not answer it. Instead, the Report and Order simply states that there is an "explosion of programming channels now available in the vast majority of homes today, and in the absence of evidence to the contrary, we cannot conclude that source diversity should be a policy goal of our broadcast ownership rules."159/ The Report and Order contains no discussion of the unavailability of signals to the poor and to rural Americans. It implicitly assumes that over 40,000,000 Americans without cable and satellite service simply do not matter in the crafting of numerical ownership caps.

It is doubtful that an agency can lawfully adopt a policy that implicitly holds that 15% of the public is irrelevant -- at least without directly explaining why that is the case. Imagine a civil defense shield, a public water system or an electricity grid that omits 15% of the public, or street lights, sidewalks and paved roads only for the wealthy parts of town.160/ Certainly the Commission's duty to regulate for "all the people of the United States"161/ requires the Commission to explain how it could be permissible to electronically disenfranchise a populace whose size rivals that of California.

If the Commission persists in using voice tests, it should count as voices only the television stations actually received off the air by every television household. This means that the Commission should:

- retract language justifying deregulation based on the presence of a "multichannel universe" that actually is beyond the grasp of 15% of the public;162/ and
- revise or reverse any decisions to deregulate, to the extent those decisions were based on the availability of this "multichannel universe."163/

159/ Report and Order, ¶45. See discussion at p. 20 n. 123 supra.

160/ Cf. Hawkins v. Town of Shaw, Mississippi, 461 F.2d 1171 (5th Cir. 1972). The Town of Shaw line of cases, applying 42 U.S.C. §1983, hold that a municipality cannot arbitrarily provide grossly inferior municipal services to its African American neighborhoods.

161/ 47 U.S.C. §151 (1996).

162/ See, e.g., Report and Order, ¶45 (abandoning longstanding protection of source diversity based on an "explosion of programming channels" in "the vast majority" of homes, irrespective of the absence of such "explosion" in the other 15% of homes.)

163/ See, e.g., id. at ¶143 ("[m]ost households subscribe to cable or DBS and receive DPV from cable networks and local broadcast television stations") and the counterintuitive assertion, offered without a shred of evidence, that "[t]he programming quality delivered to the minority of households that do not subscribe to cable or

[n. 163 continued on p. 30]

B. The Commission Should Reverse Its Authorization of Triopolies

The Commission's decision to authorize triopolies in large markets164/ was a surprise. It generated few comments, since the NPRM did not seek comment on the subject.165/

The triopoly decision was a solution in search of a problem. Large market full power television stations are almost always "a license to print money."166/ None of these stations is known to be in economic distress. Large city stations seldom are without the resources to provide full service to the public. No evidence in the record shows that diversity in large markets must be sacrificed to solve any particular urgent problem.

Furthermore, the Commission's decision omitted an important issue: the potential impact of large-market triopolies on competition and diversity on regional and national television ownership or on over-the-air television networking. Kofi Ofori, explains:

163/ [continued from p. 29]

DBS is protected by the majority of households that do subscribe. Although non-subscribing households have fewer programs choices than subscribing households, broadcasters cannot reduce the viewer appeal of their programming to non-subscribing households,without also reducing the viewer appeal of their programming to subscribing households. Broadcasters deliver the same programming to both subscribing and non-subscribing households. Thus, the majority of households that subscribe to cable or DBS assure that non-subscribing households receive appealing programming" (id. at ¶144). This is wrong for three reasons:

First, it literally creates two regulatory systems: diverse viewpoints and competitive operations for the wealthy and non-rural among us, and "appealing" programming for everyone else. The Commission did not explain why it is acceptable for 40,000,000 rural and low income Americans to settle for ostensibly "appealing" but non-diverse programming.

Second, it is based on a term the Commission did not define. Although the Commission defined "diversity" and "competition", it did not define "appealing." We have no idea what the Commission thinks "acceptable" means.

Third, the underlying premise is false. Programming designed for DPV homes may be "appealing" to urban and wealthy Americans, but it is seldom designed to serve rural and low income Americans. New York and Los Angeles-skewed entertainment fare often treats rural America as a joke. See, e.g., Joel Ryan, "Cajuns Ragin' at Hillbillies," April 10, 2003, www.earthlink.eonline.com/News/Items/0,1,11604,00.html?tnews (reporting that 43 Members of Congress and the Louisiana State Senate opposed CBS' "Real Beverly Hillbillies" program because of its alleged humiliating and stereotyping of poor and rural Americans). The continued exclusion of minorities from entertainment and news programming is well documented. See CWA Comments, pp. 59-62; National Association of Hispanic Journalists Comments, pp. 6-9. A recent law review article contains the definitive treatment of this subject. Leonard Baynes, "WHITEOUT: The Absence and Stereotyping of People of Color by the Broadcast Networks in Primetime Entertainment Programming," 45 Ariz. L. Rev. 293 (2003). It would have been more accurate to say non-subscribing households are burdened with programming that is "appealing" to urban and wealthier Americans.

164/ Report and Order, ¶¶134, 203.

165/ Regarding triopolies, the NPRM should have contained "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b)(3).

166/ See Applications for Renewal of Standard Broadcast and Television Licenses for Oklahoma, Kansas, and Nebraska, 14 FCC2d 2, 9 (1968) (Statement of Commissioners Kenneth Cox and Nicholas Johnson) ("Broadcasters receive from the Government a license which constitutes, especially in the case of television, a grant of great power and wealth, 'a license to print money[.]'")

> The Commission's discussion of triopolies shows that it considered the impact of triopolies on the local markets in which triopolies would be permitted. However, the Commission did not consider the potential impact of its triopoly decision on competition and diversity in other local markets and on the national television programming marketplace.
>
> In the nine markets with at least eighteen television stations apiece, it will now be possible to assemble "triopolies." These markets are New York, NY; Washington, D.C.; Phoenix, AR; Salt Lake City, UT; Los Angeles, CA; Philadelphia, PA; San Francisco, CA; Boston, MA; and Dallas- Ft. Worth, TX. In each of these nine markets, there is an average of eleven commercial stations that are not affiliated with one of the top ranked stations and are eligible to form triopolies. If sizable new independent television groups are to be built, the flagship stations for these groups -- or the hubs from which spokes of smaller stations will be associated regionally -- must be drawn from this critical pool of stations. By allowing these stations to be triopolized to take advantage of in-market synergies, the stations will never be able to contribute to multi-market synergies attendant to multi-city station group operations. Yet it is the station group model, rather than the duopoly or triopoly model, that carries far more public interest value. Station groups counterbalance the homogenized news and entertainment programming associated with network programming aired on the top four stations. Second, station groups provide more opportunity for upward career mobility from a company's small to large stations. Triopolies reduce local competition while not offering any of these benefits.
>
> Furthermore, in the nine markets ripe for triopolization, there are only 54 commercial stations that are not owned and operated ("O&Os") or affiliated with one of the six major English-language networks (ABC, CBS, NBC, FOX, WB and UPN), or Paxson, Univision, Telemundo or Trinity. It is these 54 stations, and these stations only, that are the eligible candidates to serve as the core properties for any new national television network that might be created. Unless a company seeking to build a national television network is affiliated with a major film studio (*e.g.* the WB), it is essential that the company have O&Os in the top markets. These O&Os form the basis for program production, for national advertising, and (because they are so profitable) for revenue generation to support the growing network before it, too, attains profitability.
>
> The triopoly decision effectively takes these 54 independent stations off the table for a potential new network startup, and caps forever the number of major television networks at its current level. To appreciate this, recall that we had almost as many TV stations in 1985 as we have today. Yet, if the triopoly rule had been adopted in 1985, there would never have been the Fox Network and, later, UPN or WB. The reason is that ABC, NBC and CBS would have bought up the stations that could otherwise have been brought together to form competing networks and reprogrammed those stations with material complementary to, and not competitive with, ABC, NBC and CBS.
>
> If there were a new major television network, it would probably be aimed at a major underserved audience: children and youth, minorities, or religious people (or some combination of these). The triopoly rule will make this achievement impossible.[167/]

CWA has offered a less restrictive alternative to triopolies: JOAs.[168/] A JOA has the advantage of providing synergies through joint back-office operations while the stations involved

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167/ Ofori Statement, §4 (fns. omitted). See also p. 35 infra (discussing statistics on top 50 market independent stations upon whose availability a new network would depend, and concluding that two new networks could probably be assembled).

168/ See discussion at p. 22 supra.

remain economic and programming competitors. Instead of allowing triopolies, the Commission should consider allowing three-station JOAs and (in very compelling cases) a duopoly joining together with a third station in a JOA.

At a minimum, before the Commission authorizes any triopolies, it should perform a study of the potential impact of triopolies on the national television marketplace. It could then revisit the triopoly question in a subsequent biennial proceeding.

C. The Commission Should Undo Its Repeal Of The Sales Solicitation Feature Of Its Failed/Failing/Unbuilt Station Policy

Even while deferring consideration of whether to ban discrimination in the sale of a station,[169/] the Commission unexpectedly repealed its only policy specifically aimed at ensuring that minorities would have a chance to buy the rare television station that comes into the market. That policy is the sales solicitation feature of its failed/failing/unbuilt station policy (the "Sales Solicitation Feature").[170/] The Sales Solicitation Feature has three attributes not shared by any other policy at issue in this proceeding: (1) it was created expressly to protect minority and female ownership; indeed, it is the only structural policy with that objective; (2) it is only four years old, and (3) the record contained no evidence that the policy was harmful. When it repealed the Sales Solicitation Feature, the Commission did not mention any of these factors.

In 1999, for the the first time, the Commission authorized the sale, to in-market operators, of failed and failing stations and unbuilt construction permits.[171/] Several parties, including NTIA, expressed concern that this step would discourage minority and female ownership. In response to these concerns, the Commission created the Sales Solicitation Feature:

169/ See discussion at pp. 10-12 supra.

170/ Report and Order, ¶¶225. The potential elimination of the Sales Solicitation Feature was not mentioned in the NPRM. Only two parties (the NAB and Pappas Telecasting Companies) sought repeal of the Sales Solicitation Feature. See Report and Order, ¶222 and n. 481. Thus, the public was unaware that the Sales Solicitation Feature might be repealed. Further, it apparently went unnoticed that we had endorsed the Sales Solicitation Feature. See April 28, 2002 Letter, pp. 18-19 and n. 37 ("a television duopoly is sometimes regarded as a situation in which only an in-market competitor would be a realistic purchaser. However, even in a duopoly situation, the Commission has recognized that an out of market buyer might place more value on a standalone property than an in-market prospective duopolist....For example, an out of market buyer may plan to build synergies based on programming or based on regional operations. Those synergies might be just as attractive from a business standpoint as the synergies flowing from a duopoly.") This endorsement of the Sales Solicitation Feature was made while addressing a different issue (equal transactional opportunity), as we had no clue that this proceeding encompassed the possible repeal of a four-year old noncontroversial policy which stood as the Commission's only express protection for minority and female television ownership.

171/ Review of the Commission's Rules Governing Television Broadcasting (R&O), 14 FCC Rcd 12903, 12938-41 ¶¶77, 81, 86 (1999 (subsequent history omitted) ("1999 Television Ownership Order").

> Although we share the concern expressed by NTIA, MMTC, BET, MAP *et al.*, and AWRT about new entry into broadcasting, the apparent decline in minority and female ownership of broadcast facilities, and the need to encourage broadcast ownership diversity, we are not convinced that that concern undermines our reasons for establishing a failed station waiver policy....as discussed below, to quality for the waiver, an applicant must demonstrate that the in-market buyer is the only reasonably available candidate willing and able to operate the station, and that selling the station to an out-of-market buyer would result in an artificially depressed price. To satisfy this element of the waiver standard, applicants will be required to give public notification that the station is for sale. Thus, minorities and women interested in purchasing a station will have an opportunity to bid. We remain very concerned about the more general problem of the decline in minority broadcast ownership and possible mechanisms to increase minority and female ownership in broadcasting, but nonetheless believe our failed station waiver criteria serve the public interest. The Commission has made a number of efforts separate from this proceeding to address minority and female ownership issues, and we hope to take further steps in this area.172/

Some of the rules at issue in this proceeding date back over 50 years, but the Sales Solicitation Feature is just four years old. It is rare for the Commission to repeal any rule just four years after its birth.

In the Report and Order, the Commission did not mention the impact of repeal of the Sales Solicitation Feature on the prospects of new, minority, and female entrants seeking to acquire the handful of available television stations. Nor did the Commission address the impact of the repeal of the Sales Solicitation Feature on the potential for new over-the-air networks. Instead, for the first time in its history, the Commission stated that it actually prefers consolidated ownership to independent ownership.

> First, for failed, failing, and unbuilt stations, we retain the existing waiver standard with one exception. We remove the requirement that a waiver applicant demonstrate that it has tried and failed to secure an out-of-market buyer for the subject station. In many cases, the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. We agree with NAB that the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market.173/

Let us take as true that "in many cases" the in-market competitors would be viable buyers. Further, for the sake of argument we will assume that new entrants or other out-of-market buyers could prevail against an in-market buyer only in "unusual" circumstances,174/

172/ 1999 Television Ownership Order, 14 FCC Rcd at 12936-37 ¶74 (fns. omitted).

173/ Report and Order, ¶225 (citing, in n. 490, NAB Comments at 80 n. 148).

174/ There was no record evidence that purchases by out of market buyers were "unusual." For example, the first purchase by minorities of full power television stations since 1999, Corporate Media Consultants Group's acquisition of WPFO-TV Portland and WCAV-TV St. Croix in March, 2003, was by an out-of-market new entrant.

although reasonable people can disagree over whether "unusual" means 10% of the time or 30% of the time. Certainly, though, "unusual" is not so infrequent that it would be a waste of effort to afford new entrants and out of market operators an opportunity to bid. Rather than ensuring that more of those ostensibly "unusual" circumstances could actually come to pass, the Commission took away new entrants' only opportunity to at least try to outbid an in-market operator to acquire a standalone television station.

For the first time in its history, the Commission has crossed a sacred line: formerly, it permitted consolidation; now it is preferring and promoting consolidation. And for only the third time in its history, it provided no advance notice when doing away with a policy created to protect minority ownership.175/

The decision to allow an in-market broadcaster an advantage in transactions over out-of-market prospects puts enormous leverage in the hands of in-market companies seeking to acquire troubled properties in their markets. It does this by rewarding licensees for dispensing with transparency in transactions -- an attribute that the Commission elsewhere says it prizes.176/ Now an in-market company can approach a weak facility and offer to take it over -- conditioned on the weak facility's owner's promise not to offer the station to others outside the market. The Commission and the public would never know that the in-market company has strong-armed its weaker competitor and closed off the possibility that new entrants will get a chance to enter new markets.

Instead of helping in-market companies exclude outside competitors, the Commission should try to help outside competitors enter new markets. After all, a duopoly or triopoly is not the only way value can be created in television. For example, an out-of-market buyer could build value through regional synergies, or by offering a unique type of programming (e.g. Spanish

175/ The other two anti-minority decisions occurred with no advance warning in 1985 in Clear Channel Repeal, 102 FCC2d at 558 (repealing the AM clear channel eligibility criteria), and a year later in Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications (NOI), 1 FCC Rcd 1315, 1319 ¶¶24-25 (1986) ("Minority Ownership Policy Suspensions") (suspending the distress sale and comparative hearing minority ownership policies). Minority Ownership Policy Suspensions so shocked and disgusted the civil rights community that the next day an emergency meeting was held at which MMTC was founded.

176/ See Report and Order, ¶52 ("[w]e see merit in encouraging transparency in dealmaking and transaction brokerage, consistent with business realities.")

(e.g. Spanish language, Asian languages, or Christian) which the in-market broadcasters are unfamiliar or uninterested, or which they are incapable of offering.177/

Indeed, unless the repeal of the Sales Solicitation Feature is reconsidered, the growth prospects of companies specializing in programming targeted to minorities and to religious people will be particularly hard-hit. For these companies, only a very small number of independent stations, not affiliated with a major network, are on the table as acquisition targets. Indeed, in the top 50 television markets, only 85 commercial stations (less than two per market) are not affiliated with one of the eight major English language networks or one of the two major Spanish language networks.178/ Many of these independent stations are failed or failing stations. It is already difficult enough for new entrants to compete with in-market broadcasters to acquire stations. Repeal of the sales solicitation feature would make it even more difficult for new entrants to prevail in bidding contests -- or even to learn of the existence of these opportunities.

Finally, the repeal of the Sales Solicitation Feature -- combined with the decision to allow triopolies -- will essentially foreclose for all time the possibility that an entrepreneur could assemble the O&Os necessary to build a new national over-the-air network.179/ With the exception of WB (whose co-parent, AOL-Time Warner, has a huge film library and unparalleled in-house production capacity) it is essential for an over-the-air network to have a solid base of O&Os. The O&Os are necessary both to ensure national distribution in most of the critical large markets and to guarantee the economic stability of the network. It is still possible for two more over-the-air networks to be created by buying (or having friendly affiliations with) a sufficient

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177/ Ofori Statement, §5.

178/ Statistic was derived by MMTC from the BIA Television Yearbook (Spring, 2003). Excluded affiliations were for ABC, CBS, Fox, NBC, WB, UPN, PAX, Trinity, Univision and Telemundo.

179/ Such a network would probably fill one of three major national "format holes" -- children/youth, minorities or religion. See p. 31 supra. Certainly it would be a profound achievement if one or two of these networks could be created. Commissioner (later Chairman) Quello has pointed out that the creation of the fourth network contributed profoundly to, inter alia, "the financial health of both independent and affiliated television stations...competition to the three established national broadcast networks and their affiliates...economic, programming, and marketing support to enable many independent UHF stations to achieve stability and profitability...[and] children's, minority-oriented and news programming." Fox Television Stations, Inc. (Second MO&O), 11 FCC Rcd 5714, 5731 (Separate Statement of Commissioner James H. Quello) (subsequent history omitted).

number of large-market independent stations.[180] By restoring the Sales Solicitation Feature, the Commission can protect against the disappearance of these stations into duopolies and triopolies and their consequent removal from the pool of potential O&Os for new networks.

IV. The Commission Should Relax And Update Its Community Of License And Transmitter Site Rules

As the Court of Appeals has pointed out, an agency cannot continue to administer regulations whose predicate has disappeared.[181] The time has come to consider whether the Commission's community of license and transmitter site rules for radio,[182] in their present form, are actually impeding the growth, competitiveness and ownership diversity of the radio industry, and the local service objectives of Section 307(b) of the Act.[183] Further, it is time to examine whether the rules arbitrarily and artificially restrain minorities and new entrants at the very moment in the Commission's history when minorities and new entrants have the greatest need for relief.

Section 307(b) does not instruct the Commission to adopt any particular form of community of license rules. It was written to afford the Commission considerable discretion in choosing where stations should be located:

> In considering applications for licenses and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as provide a fair, efficient, and equitable distribution of radio service to each of the same.[184]

180/ As noted, there are 85 top-50 market independents. See p. 35 supra. Creation of a new network almost surely requires ownership of a station serving New York and Los Angeles; New York has four independents and Los Angeles has eight (the largest number in any market). However, nineteen markets have only one independent, and ten markets have none. The average top 50 market has fewer than two. Thus, realistically, there are at most two more opportunities to create a new network, unless duopolies and triopolies make network ownership infeasible for an entrepreneur.

181/ Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979) ("[e]ven a statute dependent for its validity on a premise extant at the time of enactment may become invalid if suddenly that predicate disappears," citing Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924)).

182/ By "community of license and transmitter site rules" we refer to the AM and FM allotment criteria and the attendant transmitter site location rules. The transmitter site rules, which control the proximity of a station's transmitter site to its community of license, are found in 47 C.F.R. §73.182(c), §315(a) and §515. The interpretations of these rules policies, lore and other esoterica would fill a treatise. For simplicity, most of our discussion herein focuses on the commercial FM rules. We are not proposing modification of the television rules at this time, given the difficulty of effectuating such a modification in the midst of DTV conversion.

183/ We also note that the decision to use Arbitron-based market definitions is difficult to reconcile with the transmitter site rules' use of coverage contours, rather than the economic relationship of the station to the market, as the basis for decisions over where a station may locate its transmitter and its base of operations.

184/ 47 U.S.C. §307(b).

The FM allotment criteria were last revised in 1982.185/ They harken back to an era when there were far fewer radio stations, and when receiver technology limited the effective range of reception of many stations. Further, since 1982, America has experienced a rapid urbanization of society, and growing racial, cultural and language diversity in large communities. These factors are far outpacing the availability of large city radio signals.186/

The community of license and transmitter rules undermine diversity and localism in three ways:

First, they artificially prevent large cities from having the number of local stations required to serve the cities' growing and more diverse populations. With more signals come more niche program offerings -- exactly what these diverse communities need. Thus, the relative paucity of full coverage big-city signals imposed by the community of license and transmitter site rules inhibits diversity.

Second, they deprive local communities of truly local service. High powered exurban stations seldom if ever "serve" the towns that technically serve as their communities of license.187/ Instead, they aim at nearby large markets, where they are often not fully competitive because they lack full market coverage.188/

Third, they cause poor service to minorities, who typically are confined by segregation and wealth disparities to central cities. Yet minority owned FM radio stations are disproportionately licensed to the suburbs -- a consequence of nonminorities' 50-year first-mover advantage in securing the more attractive center city allotments.189/

185/ The FM allotment priorities were last thoroughly reviewed and revised in Revision of FM Assignment Policies and Procedures (Second Report and Order), 90 FCC Rcd 88 (1982). The priorities are (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters; with co-equal weight given to priorities (2) and (3). Id. at 91. A thorough discussion of the history of these policies and their relationship to Section 307(b) can be found in The Suburban Community Policy, The *Berwick* Doctrine, and the *De Facto* Reallocation Policy (Report and Order), 93 FCC2d 436 (1983).

186/ See p. 41 infra.

187/ In a textbook example of why bigger is not always better, a Class A FM in Frederick will serve Frederick far better than a Class C. The Class C will aim to serve Washington, but the Class A will have to serve Frederick in order to survive.

188/ See p. 40 infra.

189/ See pp. 42-44 infra.

Thus, we propose that:

1. A licensee whose station is in an Arbitron market should be able to choose any community of license in its Arbitron market, as long as its operation there would not violate the interference rules.

2. A licensee whose station is not in an Arbitron market, yet draws the majority of its listeners from an Arbitron market, should be allowed to relocate to any community in that market if, in doing so, it does not violate the interference rules.

3. A station's 60 dbu contour should be required to cover 50% of the population of the community of license.

The first priority for move-ins would be stations owned by SDBs; the second would be lower powered suburban facilities that could become competitive full market signals if moved in.[190/] After all of the move-in applications are processed, filing windows for drop-ins and signal upgrades would open up to allow for backfilling of the spectrum freed up by the move-ins. Consistent with the Section 307(b) priorities, these filing windows would open in this order:

1. Full power drop-ins that provide new or competitive local service whose audience will primarily be a rural community;

2. Rural LPFMs;

3. Rural translators;

4. Urban translators; and

5. Class of service, power, and tower height upgrades of full power stations.[191/]

Under this new paradigm to facilitate move-ins, not every exurban station could relocate, because relocation may be constrained by interference criteria rather than the community of license and transmitter site rules. However, where the community of license and transmitter site rules are the only impediment to a station becoming a move-in, our proposal would make it much easier to effectuate the move-in. And as shown infra, these new urban move-ins would also free up spectrum for new drop-ins tailored to provide rural service.

Under the current community of license and transmitter site rules, a commercial FM licensee is required to put its citygrade signal over at least 80% of the land area of the community

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190/ These two first-in categories of move-ins would each include a great many minority owned stations. As noted herein, minority owned FM stations tend to be lower power and suburban facilities. See pp. 43-44 and ns. 210 and 211 infra.

191/ Other paradigms for a new set of community of license and transmitter site rules could also serve the public better than the current rules. We hope that the newly-created Localism Task Force will include this subject on its agenda.

of license.[192/] This requirement has four attributes -- the 80% coverage requirement, the use of "land area" as one way to define the requirement, the obligation to meet the test with a citygrade signal, and the definition of a "community." As shown below, none of these criteria is rational.

Perhaps the 80% coverage requirement could be justified on the theory that some line-drawing is inevitable.[193/] However, a noncommercial FM can put its signal (a 60 dbu signal at that)[194/] over just 50% of the population or land area of the community of license. Noncommercial stations have a greater obligation than commercial stations to meet community needs -- yet, ironically, noncommercial stations are allowed to put weaker signals over their communities than the signals of otherwise similarly situated but entertainment-oriented commercial stations. Thus, to be consistent, a 50% coverage rule should apply to both commercial and noncommercial stations.

The use of "land area" as one of the measuring tools for citygrade coverage is illogical, because land does not listen to radio, people do.[195/] It follows that a rational transmitter site rule must be phrased only in terms of the percentage of the community's population covered by the signal, not the percentage of its land.

Further, the requirement that the contour covering the community of license should be the 70 dbu (citygrade) contour is outmoded, as well as irrationally inconsistent with the use of a 60 dbu contour for noncommercial FMs. In the early days of radio, citygrade coverage was a useful construct, because early tube-based radio receivers were so rudimentary that they could not deliver low-interference audio unless they were physically close to the station's transmitter. Today, even the most picky audiophiles record music off the air from stations that provide 60 dbu coverage to their homes.

192/ The relevant transmitter site rule is 47 C.F.R. §73.315(a). For simplicity, we focus on the commercial FM rule only, but similar considerations would also apply to the AM rule and the noncommercial FM rule.

193/ See, e.g., Sinclair, 284 F.3d at 159.

194/ See 47 C.F.R. §73.515.

195/ See Report and Order, ¶273 ("[w]e understand that geographic areas are less accurate than contours in measuring the signal reach of individual stations. But radio stations serve people, not land; and while radio signals may overlap over uninhabited land or even water, people in the United States tend to be clustered around specific population centers" (fns. omitted)).

Finally, the operational definition of a "community of license" has degenerated into a legal fiction that can include crossroads so tiny that the licensees do not visit them and the residents are unmindful that their communities have radio stations. Ages ago, a broadcaster chose a community to serve, then developed a radio station to suit the community's needs. Now it is the other way around: a broadcaster builds or buy a radio station that serves a market, and to achieve this, an engineer finds a community that serves the broadcaster's needs.

Understandably, almost everyone who purchases a radio station not located in a population center tries to move it closer to the population center of the market. Thus, a tiny hamlet will suffice as the "community of license" as long as it satisfies engineering constraints.196/ The station need not, and usually does not, serve any needs unique to that community of license.197/

At one time, the community of license and transmitter site rules helped rural areas receive local service. But there is a better way to meet that need: allow exurban stations to move in to population centers, and then use the rural spectrum freed up from these move-ins to seed the rural towns with new allotments. Some of this freed-up spectrum could be occupied with

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196/ Examples abound in which an applicant seeks to construct a high powered station in a small town with the real intention of serving a much larger community. The Commission has been exceedingly tolerant of this practice. See, e.g., Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Salem and Sioux Falls, South Dakota), 6 FCC Rcd 5798 (Mass Media Bureau, 1991) (allowing construction of a Class C-1 FM station in tiny Salem, SD over an objection that contended that the facility was really a de facto reallocation to Sioux Falls). In another typical case, the Bureau reallotted Channel 265A from Pana, IL to Macon, IL, a community of 1,213 people with "a number of churches, organizations, and businesses that serve the Macon Community, including many incorporating "Macon in their names, e.g.,...Macon Motel, Macon Motors, Macon Night Owl, Inc....it is important for Macon to have its own local radio station to address local issues and to provide local information for the growing Macon population [and] those traveling through Macon on U.S. Route 51[.]" Amendment of Section 202(b), Table of Allotments, FM Broadcast Stations (Pana, Taylorville and Macon, Illinois), 16 FCC Rcd 12588 12589 ¶¶4, 5 (Media Bureau 2001). This was high fiction, of course, since unmentioned in the decision was the fact that Pana is 35 miles from Decatur (population 82,500) while Macon is a suburb eight miles south of Decatur.

197/ Broadcasters' obligation to provide service tailored to the community-specific needs of their communities of license was removed since 1981, when the Commission issued Deregulation of Radio, 84 FCC2d 968 (1981) (subsequent history omitted). That decision relieved radio stations of the obligation to provide any locally originated programming. Id. at 998-99. Now it is an open secret in the radio industry that a station need only specify generic needs such as "environment" or "health care" on its quarterly Issues-Programs List and then "serve" those needs with generic national programming, such as PSAs aired at 3:00 AM. This programming need not be specifically tailored to aspects of these generic needs that are specific to the community of license. For example, a station licensed to Three Mile Island, Pennsylvania has no obligation to broadcast any programming on the subject of nuclear safety in Three Mile Island, nuclear safety generally, or even environmental protection generally. Indeed, there is no requirement that the station even broadcast the words "Three Mile Island" on the air, except in station IDs. Residents of Three Mile Island would probably be unaware that their community even has "its own" radio allotment. The station owner might never visit Three Mile Island, since the obligation to actually learn what the leaders and residents of the community actually regard are important needs was also deregulated in 1981. Further, the residents of Harrisburg, to whom the station's programming is actually aimed, would be no more aware of the problems and needs of their neighbors in Three Mile Island than they would have been if the station licensed to Three Mile Island had never existed at all.

LPFMs, or with modest-sized but full service commercial FM stations whose coverage areas are tailored to the location-specific needs of particular rural communities. For example, in our Comments, we proposed two new classes of FM stations to serve small communities: Class A1, 1500 watts at 100 meters, and Class A2 (1000 watts at 50 meters).[198/] Unlike a full Class C FM focused on a distant very large city, a station whose coverage area only includes the local population would have to prosper or fail based on its responsiveness to local needs. Further, it would be inexpensive to build and operate -- a plus for new entrants and local ownership.[199/]

Adoption of this proposal would harmonize the station allotment rules with the new Arbitron definitions, and it would also have at least six distinct and substantial advantages:

First, the new urban moved-in stations would introduce new competition, diversity and program variety to the large urban markets most in need of more stations. Obviously, large cities have far fewer stations per unit of population than smaller ones,[200/] but they also have far more demographic and language diversity than smaller cities.[201/] New stations would enhance the likelihood that radio stations will serve these emerging demographic and language groups that have the greatest needs for radio service.

Second, the more efficient use of the spectrum would substantially increase the economic value of the radio industry, and particularly the value of the radio stations that could relocate closer to the people they actually serve. By allowing more stations to reach their economic highest valued uses, this proposal would attract new investment to the industry. Companies like

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198/ These stations would efficiently serve many small communities. With low towers, these stations would be inexpensive to construct, and with low powers, they would be inexpensive to operate. They would not waste electricity and spectrum space masquerading as rural full Class C facilities, programming music aimed at residents of central cities while actually offering little of specific interest to the rural residents whose residences they unavoidably blanket.

199/ See Initial Comments, pp. 135-136.

200/ For example, there are 28 commercial radio stations licensed to New York City, whose 2000 population was 8,008,278; thus, there are 286,001 people per station in New York City. There are five commercial radio stations licensed to Binghamton, whose 2000 population was 47,380; thus, there are 9,476 people per station in Binghamton. Similarly, in the New York City radio market (ARB #1) in 2002, there were 18,003,000 people and 76 full power commercial stations, or 236,882 people per station; and in the Binghamton radio market (ARB #179) in 2002, there were 248,500 people and 17 full power commercial stations, or 14,618 people per station. Sources: U.S. Census 2000, Table DP-2 (Profile of Selected Social Characteristics) ("Census 2000 DP-2"); BIAfn Radio Market Report (First Edition, Spring, 2003).

201/ Again for example, New York City's population of persons six years of age and older includes 3,554,805 (47.6% of the total) whose primary language is not English and who speak English "less than very well." Binghamton's population of persons six years of age and older includes 2,344 (5.3% of the total) whose primary language is not English and who speak English "less than very well." Source: Census 2000 DP-2, supra.

Radio One, Citadel and Cumulus have owed much of their dramatic growth to their ability to move exurban stations into central cities. By allowing more stations to follow this example, our proposal would enable the radio industry to increase its 8% share of media advertising.

Third, the introduction of new urban move-ins would also allow some clusters to grow in size, since the number of voices in the market could increase as stations just outside Arbitron markets move into these markets.[202/] This will not be regarded by everyone as a plus factor, but it does ensure that all types of licensees, large and small, would have a chance to benefit from this initiative.

Fourth, rural areas would be poised to receive new full power and LPFM allotments tailored to meet their needs. By freeing up rural spectrum, these move-ins would create openings for new rural facilities, thereby advancing the goals of Section 307(b) far more efficiently than continuing to indulge the fiction that an unincorporated exurban crossroads is actually going to be "served" by a high powered full market station.[203/]

Fifth, the new rural stations created by freeing up rural spectrum would provide much-needed low cost entry opportunities for new and local entrepreneurs. The auction rules already provide significant incentives for new entrants.[204/] New rural allotments could be just what's needed to enable new entrants -- including the many well trained minority and female broadcast managers ready to make the transition into ownership[205/] -- to find stations of their own.

Sixth, and dear to our hearts, this new community of license and transmitter site policy would yield very substantial gains in minority and SDB ownership. Minorities own a

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202/ See p. 38 supra (proposing that "a licensee whose station is not in an Arbitron market, yet draws the majority of its listeners from an Arbitron market, should be allowed to relocate to any community in that market if, in doing so, it does not violate the interference rules.")

203/ See p. 40 and n. 197 supra (pointing out the awkward fact that radio stations don't have to address needs specific to their community of license crossroads).

204/ First, however, a serious defect in the rules must be corrected. See MMTC Petition for Reconsideration in MB Docket 95-31 (Reexamination of the Comparative Standards for Noncommercial Educational Applicants) (filed June 16, 2003) (pointing out that as the auction rules are written now, a company can claim to be entitled to bidding credits, then immediately change its structure to remove the attributes that entitled it to the bidding credits, and still use the undeserved bidding credits in the auction. This loophole reflects a sub silentio and rather startling abandonment of the Commission's decades-old policy requiring comparative downgrades in new construction permit proceedings. The loophole would remove any comparative advantages flowing from bidding credits held by legitimate small businesses.)

205/ Over the past five years, the NAB's Broadcast Leadership Program has produced about 100 graduates, each of them a broadcast manager who upon graduating is qualified to own broadcast stations. Most of the graduates of this excellent program are minorities and women. The majority are out looking for stations to buy, but very few have found stations for sale at any price.

disproportionate number of stations able to take advantage of the chance to move in to a large market. The reasons for this are well understood.[206/] The most desirable AM stations signed on during the 1920s through 1950s, and their FM counterparts signed on between the 1950s and the 1960s. Virtually no minorities were broadcast owners until the mid-1970s, however. In 1973, when TV–9 was decided and minority ownership got its first boost,[207/] minorities owned only ten radio stations (and one television station) in the entire nation. In 1978, when the 1978 Policy Statement was adopted, minorities owned only 59 radio stations (and one television station). Thus, by the time minorities had a chance to enter the business, the big-stick and heritage stations were already owned by others. After minorities entered the business, they almost never had a chance to buy these highly desirable stations. Big-stick and heritage stations licensed to large population centers are linchpins of the holdings of large nonminority owned companies, which do not sell them except as spinoffs to comply with the multiple ownership rules attendant to a merger.[208/] As a result of this and other factors,[209/] minorities were only able to buy or build less desirable suburban and exurban stations.

The weight of this history is reflected today in the holdings of today's minority owned companies. In the top 50 markets, minority owned FM stations are only 63% as likely as nonminority owned FM stations to be located in the dominant community in the market.[210/]

206/ The circumstances that caused minority broadcasters to be saddled with secondary service and be deprived of large city big-stick and heritage stations are detailed in the Radio Ownership Comments, p. 93-99.

207/ TV-9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974).

208/ See Ofori Statement, §6.

209/ These include the Commission's many actions that facilitated intentional discrimination (Initial Comments, pp. 19-35), lack of access to capital (id., pp. 32-33) and not hearing about good deals until it is too late to bid (id., pp. 37-38).

210/ See "Minority And Nonminority Commercial Radio Owners' Holdings In The Top 50 Markets," MMTC , September 4, 2003 (Annex 4 hereto), p. 5 (finding that "[m]inority owned FM stations' community of license designations are substantially less attractive than those of nonminority owned FM stations. In particular, only 24.1% of the minority owned stations were licensed to the dominant community in the market, while 38.2% of the nonminority owned stations were licensed to the dominant community in the market. Thus, minority owned stations were only 63% as likely to be licensed to the dominant community in the market as were the nonminority owned stations in the same markets. A chi-square analysis proved statistically significant at well below the 0.01 level of significance.") There was no statistical disparity between the community of license designations for minority and nonminority owned AM stations; however, minority owned stations still tend to occupy the less desirable high end of the AM band. See Consolidation and Minority Ownership, supra, pp. 15-18.

Further, minorities tend to own AM and FM stations with weaker signals[211/] -- a critical deficiency since the opportunity to transmit from the center of a market's population is essential to the competitiveness of a lower powered station. Ironically, Jim Crow residential segregation has disproportionately locked minority radio listeners into the inner cities, while the equally strange fruit of broadcast licensing discrimination has disproportionately locked minority broadcasters into the suburbs. Relaxation of the community of license and transmitter site rules would do much to repair this historical damage by enhancing the value of the holdings of minority owners. On top of this, as noted above, the creation of new rural allotments from freed-up rural spectrum would provide ownership opportunities for new entrants, including minority managers ready to buy or build their first stations.[212/]

This proposal would have many beneficiaries while cognizably harming no one.[213/] The Commission should move enthusiastically to embrace this means of building the radio industry's value, efficiency, diversity, competition and minority participation.

V. The Commission Should Review The Potential Applicability Of Grutter v. Bollinger To Its Broadcast Ownership Jurisprudence

On June 23, 2003, the Supreme Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions."[214/] Some of the nation's most distinguished broadcasters were amici for the University of Michigan in Grutter.[215/]

211/ Id., finding that minority owned broadcasters are disproportionately likely to own Class A FM stations. In 2001, 53% of minority owned FM stations were Class A, while 40% of nonminority owned FM stations were Class A. Thus, minority owned FM stations were 32% more likely than nonminority owned FM stations to be Class A. See Consolidation and Minority Ownership, supra, p. 18. Further, in 2001, 34% of minority owned AM stations had frequencies of 1410 kHz or more, while 28% of nonminority owned AM stations had frequencies of 1410 kHz or more. Thus, minority owned AM stations were 21% more likely than nonminority owned AM stations to have a frequency of 1410 kHz or more. Id., p. 16.

212/ See p. 42 supra.

213/ To be sure, not every company will benefit in the short run if this proposal is granted; inevitably, some companies will face more competitors. But that is not a "harm" that the Commission has recognized since 1982, when it repealed the Carroll doctrine. See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations (R&O), 3 FCC Rcd 638, 640 (1988) (deciding to rely on market forces to promote competition, and therefore abandoning the notion of "ruinous competition" expressed in Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958)).

214/ Grutter, 123 S.Ct. at 2337. Even before Grutter was handed down, it was possible to design a contracting plan tailored to remedy past discrimination. See Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), certiorari dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001). The underlying DOT program was defended in the Supreme Court by Solicitor General Olson.

215/ These included Emmis, General Electric, Granite, Hispanic Broadcasting Corp., LIN Television, MTV Networks, Radio One, Susquehanna, and The YES Network. No media company filed in opposition to the University.

Grutter has profound and promising implications for broadcast regulation, since the purpose of diversity in higher education is closely analogous to diversity in broadcasting. Justice O'Connor's opinion in Grutter cited with approval Justice Powell's invocation, in Bakke, of "our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy[.]"216/ Her opinion cites with approval Justice Powell's conclusion in Bakke that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university "seeks to achieve a goal that is of paramount importance in the fulfillment of its mission."217/ Further, Justice O'Connor 's opinion pointed to the importance of "diminishing the force of...stereotypes" as "both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students."218/

This promotion of the "robust exchange of ideas" and "diminishing the force of...stereotypes" are exactly the purposes of the Commission's policies that promoted minority ownership.219/ Perhaps there are some industries for which racial diversity might not inevitably lead to a better product.220/ Nonetheless, if there is any industry for which racial diversity in employment and ownership unquestionably produce a better product, broadcasting is that industry. Just as racial diversity in the classroom promotes competitiveness and quality in business, racial diversity in broadcasting promotes competitiveness and quality in the programming that sustains the well informed populace that is essential to democracy. Minority ownership impact viewpoint diversity in three ways:

216/ Id. at 2339.

217/ Id., citing Regents of the University of California v. Bakke, 438 U.S. 265, 313 (1978) ("Bakke") (quoting Keyishan v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)).

218/ Grutter, 123 S.Ct. at 2341.

219/ Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 556 (1990) ("[a]dequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community, but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934...but also of the First Amendment"); see also Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (NPRM), 10 FCC Rcd 27887 ¶1 (1995) (purpose of developing new minority ownership initiatives "is to further the core Commission goal of maximizing the diversity of points of view available to the public over the mass media, and to provide incentives for increased economic opportunity" (fn. omitted)).

220/ See NAACP v. FPC, 425 U.S. at 670 (where the public interest standard in the Power and Gas Acts were "a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates" and a court could find that an EEO rule might not advance that objective).

First, minority ownership is by far the largest incubator of minority employment[221/] -- a proven diversifier of viewpoints through the interactions of employees within a station.[222/] The impact of racial diversity in broadcast employment has been profound; indeed, the entry of people of color into the world of broadcasting may have done more than any other trend in the past two generations to improve the quality of what viewers see and what listeners hear. The all-White "Mickey Mouse Club" seems quaint now when compared to the bold and highly effective initiatives of the modern ABC-TV, from its hiring of Mal Goode as its U.N. correspondent in 1962, to its choice of Max Robinson as a co-anchor for World News Tonight in 1978, to the multiracial cast of Cinderella in 1997. Without racial diversity, the Fox, UPN and WB networks might never have survived. Nobody misses the poor quality of what passed for journalism on Jackson, Mississippi's WLBT-TV in 1955.[223/]

Second, minority ownership enhances diversity of viewpoints by bringing the station owner's perspective to the airwaves on her station. Station owners are expected to decide what goes out over the air.[224/] Research, including the Commission's own research, shows that minority ownership significantly influences programming decisions.[225/]

Third, minority ownership enhances diversity on stations owned by nonminority broadcasters who interact with, respect and learn from their minority counterparts. Just as racial interaction within a broadcast station influences the way the station programs to its community, the interactions among minority and nonminority owners, each with its own perspective on the world, helps make a multiplicity of viewpoints available to the public. Broadcast station owners constitute one of the most exclusive and influential clubs in the American polity. Station owners

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221/ See EEO Supporters Comments in Docket 98-204, supra, p. 53 n. 124 (reporting that 52% of minorities in radio work at minority owned stations).

222/ NAACP v. FPC, 425 U.S. at 670 n. 7 (observing that the FCC's broadcast EEO rules "can be justified as necessary to satisfy its obligation under the Communications Act of 1934...to ensure that its licensees' programming fairly reflects the tastes and interests of minority groups.")

223/ See Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 998 (D.C. Cir. 1966).

224/ See TV-9, 495 F.2d at 938 ("it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news" (fn. omitted)).

225/ These studies are collected in the Initial Comments, pp. 69-71, in the Supplemental Comments of Diversity and Competition Supporters (January 27, 2003), Exhibit 1, and Reply Comments at 9 n. 15.

gather in local ad councils, at local, state and the national associations of broadcasters, at professional conferences, and in local and national charitable and service organizations like the Broadcasters Foundation and the Emma Bowen Foundation for Minority Interests in Media. In these venues, broadcasters convene as equals, exchanging information and forming and refining their viewpoints. When those viewpoints find expression in broadcast programming, they become the greatest single influence on the direction and quality of democracy in our nation.

As Grutter reminds us, the inclusion of a critical mass of minorities in a classroom would show that the views of minorities are not monolithic.[226/] Public awareness of the diversity of views held by minorities will lead to a stronger democracy and "a more perfect union."[227/] Therein may reside the greatest value to democracy that racial diversity in broadcast ownership has to offer.

The NPRM in this proceeding asked whether the Commission could initiate race-conscious programs without falling afoul of the constitution.[228/] Recognizing this, we offered only race-neutral proposals in our Comments.[229/] Fortunately, Grutter amply justifies the conclusion that promoting racial diversity in broadcasting is a compelling state interest, and that narrowly tailored means that modestly consider race are constitutionally permissible. Armed with this finding, the Diversity Committee's charge can be expanded to include the option of developing narrowly tailored, constitutionally permissible means of advancing racial diversity in broadcast ownership.

226/ Grutter, 123 S.Ct. at 2334 (citing expert testimony that "indicated that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students.")

227/ U.S. Constitution, Preamble.

228/ NPRM, 17 FCC Rcd at 18521 ¶50 and n. 123.

229/ We noted, however, that "[t]ime may reveal that the race-neutral initiatives advocated in these Comments are inadequate." Initial Comments, p. 80.

Respectfully submitted,[230/]

David Honig

David Honig
Executive Director
Minority Media and
Telecommunications Council
3636 16th Street N.W., Suite B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@crosslink.net

Counsel for Diversity and
Competition Supporters

September 4, 2003

230/ The Diversity and Competition Supporters appreciate the research assistance of MMTC's Earle K. Moore Fellows, Fatima Fofana, Esq. and Julie Smith, Esq.

ANNEX 1

DIVERSITY AND COMPETITION SUPPORTERS

American Hispanic Owned Radio Association
Civil Rights Forum on Communications Policy
League of United Latin American Citizens
Minority Business Enterprise Legal Defense and Education Fund
Minority Media and Telecommunications Council
National Asian American Telecommunications Association
National Association of Latino Independent Producers
National Coalition of Hispanic Organizations
National Council of La Raza
National Hispanic Media Coalition
National Indian Telecommunications Institute
National Urban League
Native American Public Telecommunications, Inc.
PRLDEF-Institute for Puerto Rican Policy
UNITY: Journalists of Color, Inc.
Women's Institute for Freedom of the Press

ANNEX 2

STATEMENT OF KOFI OFORI

I, Kofi A. Ofori, state as follows:

I am the President of Ofori & Associates, a consulting firm that provides legal and business development services to broadcast companies and entrepreneurs. I founded the company in 1985. We develop business strategies and business plans, and conduct economic and marketing assessments of broadcast markets. My practice also involves representing clients before the FCC.

I earned my B.A. degree in 1973 from Tufts University, with a major in political science. In 1976, I earned my J.D. degree from Boston University School of Law. Among my principal publications are: *Blackout! Media Ownership Concentration and the Future of Black Radio*, Medgar Evers College Press, (1997)*; When Being No. 1 is Not Enough: the Impact of Advertising Practices on Minority-Owned and Minority-Formatted Broadcast Stations,* Civil Rights Forum on Communications Policy (1999)*; The Value of Tax Certificates,* 51Federal Communications Bar Journal, 553 (1999); *In the Black: African-American Web Entrepreneurs,* Reinventing Minority Media for the 21st Century, The Aspen Institute (2001); and *Radio Local Market Consolidation and Minority Radio Ownership*, Minority Media and Telecommunications Council (2002*).*

I am providing this statement at the request of the Diversity and Competition Supporters (MMTC et al.)

1. If the FCC allows the new rules to take effect before it adopts rules designed to promote minority ownership, what will be the consequences for minority broadcasters?

Based upon past history, minority broadcasters are likely to lose market share if steps are not taken to level the competitive playing field between minority and better-financed non-minority competitors. As discussed below, minorities lack the capital to take advantage of the measures proposed in the Commission's *Report and Order*.[1]

The *Report and Order* professes to advance the goals of competition, diversity and localism, yet it undermines those goals by failing to take adequate steps to promote minority ownership. As reported in a study commissioned by the FCC in 1999, [2] minority ownership is empirically linked to localism and diversity of viewpoint as expressed in news and public affairs programming.[3] In light of the record of this proceeding,[4] it is inconsistent with the Commission's pro-diversity goals to permit the rules to take effect without first taking practical steps to promote minority ownership.[5]

Recent history has shown that minority broadcasters are constrained by lack of capital and unable to take advantage of opportunities to acquire new stations under relaxed ownership rules. Two reports commissioned by

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1 Report and Order, *In the Matter of* 2002 Biennial Regulatory Review, FCC 03-237 (released July 2, 2003) ("*Report and Order*").

2 Christine Bachen *et al.*, Santa Clara University, *Diversity of Programming in the Broadcast Spectrum: Is there a Link between Owner Race or Ethnicity and News and Public Affairs Programming?* (1999).

3 The Santa Clara University study found that substantially more minority owned stations cover news stories differently from their chief competitors. *Id.*

4 The study by Santa Clara University is part of the record of the instant proceeding. *See* Reply Comments of MMTC, Appendix 1, *Radio Local Market Consolidation and Minority Ownership* by Kofi A. Ofori. May 8, 2002, in response to the Notice of Proposed Rulemaking, 17 FCC Rcd 18503 (2003).

5 The Commission has elected to explore proposals to advance female and minority ownership in a separate proceeding that will address whether they can withstand judicial scrutiny. *Report and Order*, ¶50. However, as the Commission notes, several studies have already been completed that document discriminatory market entry barriers. *Report and Order*, n. 70. In addition, many of the pro-minority proposals submitted by MMTC are not race specific and therefore not subject to strict judicial scrutiny.

the FCC confirm that minority broadcasters operate in a discriminatory capital market.[6] Second, minority broadcasters have lost while non-minority competitors have gained market share as a result of deregulation. For example:

TV-Radio Crossownership and TV Duopolies: There is an inverse relationship between the change in the total number of television stations and the change in the number of minority owned stations. The number of full power commercial television stations increased 14.4% from 1,176 in 1995 to 1,345 in 2003.[7] During the same period, the number of stations owned by minorities declined 60% percent from 38 to 22. [8] Many of these 22 stations are marginally profitable. From 1993 through 1999, the average television station revenues of non-minority stations were almost triple those of minority stations.[9] The number of minority owners between 1998 and 2000 also declined from 16 to 12.[10] The decline in minority ownership has been attributed to the Commission's 1999 decision[11] to relax its duopoly rule and its "one-to-a-market rule." According to NTIA, "consolidation [has had a] detrimental impact upon the ability [of minority owners] to effectively compete against better financed non-minority group station owners."[12] Indeed, to date no minority entrepreneur has succeeded in acquiring a duopoly or a radio/television combo. Past developments are a clear indication that policies favoring triopolies and greater numbers of radio/television combinations further threaten the survival of minority ownership. Lack of access to capital has created a barrier to expansion in the past and will likely continue to prevent minorities from receiving any benefits from the measures that the Commission contemplates implementing.

National Cap. Minorities have yet to reach the pre-1996 Telecommunications Act threshold of 25% much less the new cap of 45%. Granite Broadcasting, the largest minority-controlled television broadcaster, reaches a 6% national audience.[13] Granite has been in operation since 1993. Given the past performance of minority television broadcasters, it is unlikely that minorities will benefit from the 45% cap.

Newspaper-Broadcast Crossownership. In 2002, there were an estimated 1,457 daily newspapers in the U.S.[14] The dearth of minority viewpoints expressed in these dailies is reflected by the fact that minorities comprise only 9.9 percent of all newsroom supervisors compared to over 30% of the American population.[15] The number of

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6 W. Bradford*, Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes* (December 2000), ("*Discrimination in Capital Markets*") (Minority broadcast license holders were less likely to be accepted in their application for debt financing….Minority borrowers paid higher interest rates on their loans). Ivy Planning Group, *Whose Spectrum is it Anyway? Historical Study of Market Entry Barriers and Changes in Broadcast and Wireless Licensing, 1950 to Present* (December 2000), *("Whose Spectrum is it Anyway").*

7 Federal Communications Commission at http://www.fcc.gov/mb/audio/totals/ accessed August 27, 2003.

8 Figure based upon the number of minority stations reported for the year 2000 , *Changes, Challenges and Charting New Courses: Minority Commercial Broadcasting Ownership in the United States,* National Telecommunications and Information Administration, U.S. Department of Commerce (December 2000) (" *Changes & Challenges*"), at 45.

9 *Id*. at 47.

10 *Id.* at 45.

11 *Report and Order*, *In the Matter of the Commission's Regulations Governing Television Broadcasting and Television Satellite Stations Review of Policy and Rules*, 14 F.C.C. Rcd 12, 903 (1999).

12 Changes & Challenges*.* at 32.

13 Granite Broadcasting Corporation at http://www.granitetv.com/gbc/gbcstations.htm accessed August 27, 2003.

14 Newspaper Association of America at www.naa.org/info accessed August 27, 2003, *citing* Editor and Publisher magazine.

15 26th Annual Newsroom Census conducted by the American Society of Newspaper Editors. *See* www.asne.org accessed August 27, 2003.

dailies owned by minorities is estimated to be less than 10 (*i.e.* 2 African American, 6 Hispanic (mainland), and 2 Puerto Rican dailies[16]). Thus, it is unlikely that any significant amount of news and editorial viewpoints written by and about minorities will be expressed in the large non-minority dailies that are financially positioned to acquire newspaper-broadcast crossownerships. Dailies owned by minorities are unlikely to be the first to participate in newspaper-broadcast crossownerships due to the lack of adequate capital.

The new rules, therefore, will favor non-minorities who in the past have locked up prized media properties through horizontal crossownership and vertical integration. The Commission has sought to safeguard the interests of diversity and competition by permitting the sale of grandfathered "above-cap" combinations to "eligible" small businesses.[17] This measure is a welcomed exception to the rule generally banning the transfer of such combinations. However, the success of this exception rule will turn on the financial capacity of minorities to take advantage of it. The *Report and Order* duly noted 13 pro-minority initiatives proposed by MMTC, which will be incorporated into a new Notice of Proposed Rulemaking. The Commission, however, appears not to understand that by segregating the minority initiatives, there will be a significant time delay – perhaps years – before an complete solution (*i.e.* one that addresses regulatory and financial incentives) can be implemented. As a consequence, non-minorities will enjoy a substantial headstart, unless the new rules are implemented in stages that take into consideration measures that will be adopted in the minority broadcaster proceeding.

Staged implementation of the rules has been recommended by the Diversity and Competition Supporters and also Paxson Communications. This recommendation is justified by the fact that most minority owned companies are small, and few of them have a fulltime business planner on staff or on retainer. Indeed, only a few minority owned companies are large enough to employ a corporate comptroller fulltime. Consequently, when new ownership rules are announced by a regulatory agency, small companies generally will need more time than other companies to adjust their business plans and strategies, seek new sources of funding, and perform the extensive entrepreneurial work required to seek out and pursue new acquisition opportunities. These activities require extensive management time, and a small company is often preoccupied with just staying afloat day to day. They cannot "turn on a dime" when the FCC changes its rules. The Diversity and Competition Supporters have referred to this as "shock effect" and that characterization accurately captures what happens to small companies when regulatory change occurs overnight. This "shock effect" could be overcome if the FCC elected to deregulate gradually and methodically.

The new ownership rules, as presently structured, will cause some investors to doubt whether minority broadcasting has the potential for growth, because of the relative advantages conferred on nonminority broadcasters. The *Report and Order* fails to take low-cost, high-impact steps that could have helped minority entrepreneurs (*e.g.* prohibiting transactional discrimination). If investor confidence in minority broadcasting lags significantly, we can expect further constraints on the already severe and well-documented lack of access to capital faced by minority broadcasters.[18]

2. What are likely to be the racial compositions of the class known as "eligible entities" in the FCC's Report and Order and defined as "economically and socially disadvantaged businesses" in Senator McCain's Telecommunications Ownership Diversification Act of 2003?

In an effort to promote diversity of ownership, the Commission adopted an exception to the prohibition against the transfer of combinations that are grandfathered because they are in violation of the new local ownership and crossownership limits.[19] "Eligible entities" entitled to purchase such combinations are required to have $6 million or less in annual revenues in the case of radio broadcasters and $12 million or less in annual revenues in the case of TV broadcasters.[20] An estimated 88%, or 1,219 of the total number of 1,387 radio owners will qualify as

16 Estimates are based upon the membership of the National Newspaper Publishers Association and the National Association of Hispanic Publications.

17 *Report and Order* ¶ 488.

18 See note 6, *supra.*

19 *Report and Order* ¶¶ 487 and 488.

20 *Id.* ¶489. Eligible entities must also satisfy ownership control tests. The eligible entity must hold (1) 30% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, (2) 15% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, and no other person or entity controls more than 25% of the outstanding stock, or (3) if the purchasing entity is a publicly traded company, more than 50% of the voting power.

"eligible entities" under the Commission's definition.[21] The high percentage of "eligible entities" is due to high degree of ownership consolidation in the radio industry. Twelve percent, or 168, of all radio broadcasters have revenues that range from $6.2 million to $3.5 billion, while 88% have revenues from $25 thousand to $6 million. Minority radio broadcasters that are not publicly traded are estimated to comprise only 4.5% of the "eligible entities."[22] Considering the fact that the vast majority of broadcasters will be able to qualify as "eligible entities", one can hardly say that the grandfather exception is sufficiently tailored to benefit minority broadcasters who are more capable of providing diverse points of view in the news and public affairs.[23]

An effort to target "economically and socially disadvantaged businesses" ("SDBs") has been made in Senate Bill 267, the Telecommunications Ownership Diversification Act of 2003. The definition of "SDBs" parallels the ownership control tests of the FCC, but substitutes media ownership interests and advertising share for the revenue limits contained in the FCC guidelines. Specifically, Senate Bill 267 requires "SDBs" not to have an ownership interest in more than 50 radio stations, and any radio station with a combined revenue market share of 10% in any Arbitron market. In the case of television stations, "SDBs" cannot have an ownership interest in television stations with an aggregate national audience reach of more than 5%.

An analysis of the "SDBs" definition for radio stations indicates that despite the intention to tailor benefits to social and economically disadvantaged firms, 2,391 radio broadcasters[24] would qualify as "SDBs" – more than those that would qualify under the FCC's definition of "eligible entities."

Given the results of the analysis, I recommend that the Commission <u>not</u> adopt the Senate Bill 267 definition for entities entitled to acquire grandfathered combinations. To do so would only make it more difficult for minority broadcasters to be afforded the opportunity to acquire a grandfathered combination. The analysis of the FCC and Senate Bill definitions also shows that minority broadcasters, as a class, are unlikely to benefit from measures geared to small businesses for the simple reason that the vast majority of broadcasters can meet the definition of a small business. While market entry by small businesses will advance the goal of competition, the goal of diversity of viewpoint will require measures tailored primarily to minority broadcasters.

3. Do minorities pay less than non-minorities when they acquire broadcast stations?

I am not aware of situations in which a seller chose to offer a station to minorities at a lower price than the station was offered to non-minorities. Actually, minorities, like many new entrants, typically pay a premium to buy a broadcast station. They do this primarily for three reasons.

First, the financial market discriminates against minorities by forcing them to sign personal guarantees, post excessive collateral, and accept higher rates of interest.[25]

Second, sellers very often require minorities to offer more money because of the false perception that minorities are unlikely to close or due to the buyer's relative inexperience and lack of a long history of successful closings.

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21 Data source is the BIA Media Pro database with 2002 revenues. Figures are based upon the annual revenues of the parent owner as required by SBA guidelines (*see Report and Order* n. 1044). Owners for which no parent revenues were reported in the BIA database were not included in the estimate. Assuming that parent revenues were less than $6 million for the 3,286 owners for which no parent revenues were reported, 70% of the broadcasters would qualify as "eligible entities." **Estimates do** <u>not</u> consider the FCC's ownership control tests.

22 The number of minority owners is based upon figures reported in the NTIA broadcast ownership report for 1996, adjusted for those that are now publicly traded and that earn $6 million or less in revenues (approximately 148). *Minority Commercial Broadcast Ownership in the United States*, NTIA, U.S. Department of Commerce, April 1996.

23 Notes 2 and 3, *supra*.

24 Data source is the BIA Media Pro database with 2002 revenues. Stations located outside of Arbitron markets were not included in the analysis because no market revenues needed for the calculation are reported for those broadcasters. **Estimates do** <u>not</u> consider the S. 267 ownership control tests.

25 Statistical evidence may be found in *Discrimination in Capital Markets,* p. vii. Anecdotal evidence may be *Whose Spectrum is it Anyway?* Pp. 17 – 26.

Third, simply to get their feet in the door and have brokers return their phone calls or seek them out, minorities must develop a reputation for paying generously for properties. As stated by one media buyer,

> *…[O]ur number one criteria… is can they pay for it at the closing and will they pay the most. And that kind of supersedes everything.*[26]

4. What would be the impact of major market triopolies on the national television network marketplace and on minority ownership?

The Commission's discussion of triopolies shows that it considered the impact of triopolies on the local markets in which triopolies would be permitted. However, the Commission did not consider the potential impact of its triopoly decision on competition and diversity in other local markets and on the national television programming marketplace.

In the nine markets with at least eighteen television stations apiece, it will now be possible to assemble "triopolies."[27] These markets are New York, NY; Washington, D.C.; Phoenix, AR; Salt Lake City, UT; Los Angeles, CA; Philadelphia, PA; San Francisco, CA; Boston, MA; and Dallas- Ft. Worth, TX.[28] In each of these nine markets, there is an average of eleven commercial stations that are not affiliated with one of the top ranked stations and are eligible to form triopolies. If sizable new independent television groups are to be built, the flagship stations for these groups -- or the hubs from which spokes of smaller stations will be associated regionally -- must be drawn from this critical pool of stations. By allowing these stations to be triopolized to take advantage of in-market synergies, the stations will never be able to contribute to multi-market synergies attendant to multi-city station group operations. Yet it is the station group model, rather than the duopoly or triopoly model, that carries far more public interest value. Station groups counterbalance the homogenized news and entertainment programming associated with network programming aired on the top four stations. Second, station groups provide more opportunity for upward career mobility from a company's small to large stations. Triopolies reduce local competition while not offering any of these benefits.

Furthermore, in the nine markets ripe for triopolization, there are only 54 commercial stations that are not owned and operated ("O&Os") or affiliated with one of the six major English-language networks (ABC, CBS, NBC, FOX, WB and UPN), or Paxson, Univision, Telemundo or Trinity. It is these 54 stations, and these stations only, that are the eligible candidates to serve as the core properties for any new national television network that might be created. Unless a company seeking to build a national television network is affiliated with a major film studio (*e.g.* the WB), it is essential that the company have O&Os in the top markets.[29] These O&Os form the basis for program production, for national advertising, and (because they are so profitable) for revenue generation to support the growing network before it, too, attains profitability.

The triopoly decision effectively takes these 54 independent stations off the table for a potential new network startup, and caps forever the number of major television networks at its current level. To appreciate this, recall that we had almost as many TV stations in 1985 as we have today. Yet, if the triopoly rule had been adopted in 1985, there would never have been the Fox Network and, later, UPN or WB. The reason is that ABC, NBC and CBS would have bought up the stations that could otherwise have been brought together to form competing networks and reprogrammed those stations with material complementary to, and not competitive with, ABC, NBC and CBS.

If there were a new major television network, it would probably be aimed at a major underserved audience: children and youth, minorities, or religious people (or some combination of these). The triopoly rule will make this achievement impossible.

5. How is the repeal of the Sales Solicitation Feature of the failed/failing/unbuilt station policies likely to affect minority ownership, competition and diversity?

In 1999, the Commission, for the first time, allowed the sale of failed and failing stations and unbuilt

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26 *Whose Spectrum is it Anyway*? P. 17.

27 *Report and Order*, ¶¶ 134 and 203.

28 Bill McConnell, *FCC Does the Waive*, Broadcasting & Cable, July 7, 2003.

29 The triopoly decision effectively eliminates many of these markets because it affects 7 of the top 10 markets.

construction permits to in-market operators.[30] To avoid excluding new entrants and others whose entry to a market would preserve competition and diversity, the Commission added a layer of protection: a seller must first solicit interest from those outside the market. [31]

In adopting this "Sales Solicitation Feature," the Commission required a transfer applicant to demonstrate that the in-market buyer is the only reasonably available candidate willing and able to operate the station and that selling to an out-or market buyer would result in an artificially depressed price.[32] The "Sales Solicitations Feature" was also partly based upon the Commission's shared concern "…about new entry into broadcasting, the apparent decline in minority and female ownership of broadcast facilities, and the need to encourage broadcast ownership diversity…[33] As a safeguard to protect the goals of competition and diversity the Commission took steps to ensure that minorities and others would be afforded the opportunity to acquire a failed, failing or unbuilt station:

> *To satisfy this element of the waiver standard, applicants will be required to give public notification that the station is for sale. Thus, minorities and women interested in purchasing a station will have an opportunity to bid.*[34]

The declining number of minority-owned television stations is a problem of even greater magnitude now than it was in 1999. Yet, in dispensing with "Sales Solicitation Feature," the Commission, in its *Report and Order*, failed to explain why it departed from a policy that successfully balanced economic efficiencies with the public interest benefits attendant to increased minority ownership (*i.e.* competition and diversity). Citing to a footnote in Comments submitted by the National Association of Broadcasters ("NAB"), the Commission agreed with the unsubstantiated assertion that the economic efficiencies associated with two-station ownership will "always" be the result of an in-market transfer.[35] NAB failed to provide any evidence in support of its argument that the economic benefits of in-market transfers are "inherently unlikely" to result in broadcasters being able to find an out-of-market buyer.[36] This assertion contradicts evidence of out-or market sales that have successfully closed (e.g., the purchase of WPFO-TV, Channel 23, Portland, ME by Corporate Media Consultants Group LLC from Paxson Communications Corp. in March, 2003). The out-of-market policy ensured successful transactions by protecting buyers from artificially depressed prices.

The Commission should also not assume that economic efficiencies result exclusively from in-market combinations. Economies of scale and market synergies also result from regional combinations. Regional combinations can reduce the cost of sales operations while at the same time increase advertising though regional marketing strategies. It is also possible for regional combinations to result in the failed, failing or unbuilt stations carrying programming (e.g. Asian, Spanish language, Asian or Christian) that serve niche markets not served by other broadcasters, thus advancing the goal of diversity.

6. If a radio station is licensed to a population center, has full market coverage, and is owned as part of a cluster, how likely is it that the station will be sold?

Full market coverage stations, such as low-band AM clear channel facilities and high power FM stations licensed to population centers, are highly desirable beachfront property in the radio business. Typically, these "heritage" or "big stick" properties form the nucleus or linchpins of a cluster. They are usually programmed with a popular mainstream format such as News or News/Talk (for AM stations), MOR, rock or country/western. Their economic stability and broad general market appeal make them natural core properties for clusters.

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30 *Review of the Commission's Regulations Governing TV Broadcasting, TV Satellite Stations Review of Policy & Rules*, 14 FCC Rcd 12903 (1999) ("*Local TV Ownership Report and Order*").

31 *Id.* at 12941. 47 C.F.R. § 73.3555, note 7.

32 *Id.*

33 *Id.* at 12936.

34 *Id.* at 12937.

35 *Report and Order*, ¶225.

36 Comments of NAB, n. 148.

A company whose business plan is based on growing clusters will never include in that business plan an option of reducing the size of the cluster by spinning off one of these core stations. While it is not always optimal to have a cluster of the maximum permissible size, it is seldom desirable to reduce the size of any cluster. If the cluster is performing poorly, the cause of that poor performance will almost never be attributable to the decision to include a full service station in the cluster. Even if the core station performs poorly within a cluster, the business solution is always to reprogram the station rather than spin it off to a competitor.

"Heritage" or "big-stick" stations are key to the success of a cluster. Therefore, there are only two occasions when these stations are assigned or transferred. One occasion arises when the parent company is sold to another company or merges with another company. In such transactions, the entire cluster is normally transferred intact. However, if both the buyer and seller own clusters in the same market, such that the combined clusters will exceed the local ownership limits, or in rare cases raise antitrust concerns that are not remediable, the parties will then need to spin off some of their stations. It is conceivable that the least profitable of the "big-stick" or "heritage" stations will be spun off in circumstances where the holdings of the merged company exceed the limits of the rules. However, these occasions arise very rarely. Only one such situation has arisen since 1999 -- the Clear Channel-AMFM merger of 2000.

* * * * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing Statement is true.

Executed September 3, 2003.

Kofi A. Ofori

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Kofi A. Ofori
Ofori & Associates
1821 Shepherd St NE
Washington, D.C. 20018
Phone: (202) 529-4415
Email: Ofori@att.net

ANNEX 3

EXCERPTS OF TRANSCRIPT OF HEARING:

THE IMPACT OF MEDIA CONSOLIDATION ON MINORITY REPRESENTATION AND OWNERSHIP

Wayne State University School of Law
Detroit, Michigan
Monday, May 19, 2003 - 12:00 PM

Hosted by Congressman John Conyers, Jr.

Commissioner Michael Copps
Congressman John Conyers
Professor John Arnold
Councilwoman JoAnn Watkins

Pp. 7-8: Testimony of Janine Jackson, Fairness and Accuracy in Media (FAIR)

> [C]onsolidation in the media industry has meant layoffs. It's meant mergers that have led to layoffs. Some 70,000 journalists have been laid off since June of 2000. That number is always in flux, but there are websites cropping up to actually track layoffs in the journalism industry because it's such a prominent feature of the landscape. And again, situations of scarcity of opportunity always hit those who have been historically excluded the hardest, and who continue to face discrimination. So add to that that these consolidations also mean budget cutbacks and affect the very programs, the internships, the outreach efforts and so forth that were designed to counter this historic and ongoing exclusion and discrimination....
>
> This is all against a backdrop, as we all know, in which people of color are underrepresented in the media business. A lot of numbers you could look for here, but for journalists, a recent study from Poynter [Institute] has indicated that 9.5 percent of journalists are people of color. And again, that's against 27 or 30 percent of the population....

Pp. 12-13: Testimony of Verna Green, Black Chamber of Commerce, former President, WJLB

> The challenge of consolidation, though, if you look at economic development at a local level, is that the vertical integration that results from consolidation literally wipes out some jobs that are critical at a local level. Consolidation has created some jobs at management levels that are beyond the station level. But when you look at what happens inside the station, other than the sales departments, those jobs are disappearing.
>
> There are announcers whose voices are heard all over the country and yet what that meant to the pool of potential talent to be developed, it literally has disappeared. So, it's kind of an almost now, a Catch-22 situation in that because there are such powerful announcers on morning shows that are heard all over the country, there's literally no farm team to replace them once they leave because there's no training opportunity because positions simply don't exist.
>
> There are positions that used to be held locally by announcers in some overnight positions. Those are done now with voice tracking.
>
> So you look to the industry and you admire the technological expertise and the ability to shirt down cost, so that each activity yields more and more and more profit.

But, if you considered that most of the, let's say, African American employees in the radio stations are hired by African American owners, the possibility of that talent pool growing is slim to none.

An example, at the station level now, the management decision making scope is lessened. They cannot determine which research companies to use, which research methods to use, in some cases, who handles travel, so that the local entrepreneurs who engage these opportunities, they're being shut out of these business opportunities.

So, the consequence of consolidation in terms of local economic development is negative. In terms of understanding how to develop an economic model in generating profit, consolidation is wonderful.

P. 18: <u>Testimony of Peter Dicola, Director of Economic Analysis, Future of Music Coalition</u>

The Radio/Television News Directors Association Foundation reported in 2001 that in the last seven years, the size of the typical radio newsroom has fallen 56.7 percent from 4.5 news people in 1994 to 1.95 today.

A newsroom with two people is bound to devote less resources to covering issues of interest to minorities, both ethnic minorities and people with minority opinions....

Pp. 44-46: <u>Testimony of Tony Gray, President, Gray Communications</u>

Much of my career has been centered on programming radio stations that target African American consumers across the country. And I've had the pleasure of working for some of the larger more important companies, companies that have benefitted from the deregulation of 1996. And also, I've had the pleasure of working for a number of the minority-owned and operated radio stations in the country as well.

The relationships are a a little different and I want to tell you a little bit about why I think that minority ownership is important, because I've had the experience of working for both.

In my opinion minority ownership and participation in the media is crucial because it provides an outlet that focuses on issues relevant to minorities, issues that are often neglected by networks and general market broadcasters.

In comments to the FCC, the National Association of Black Owned Broadcasters set forth ten reasons why minority ownership of stations is important.

Point No. 1, the tailored coverage of national news stories to address minority concerns.

Point No. 2, they cover major stories that are not covered by major market or general market operators.

Point No. 3, they approach news stories from a different perspective than the general market competitors.

Point No. 4, they pay special attention to public affairs programming that focuses on issues of great concern to the ethnic comp[onents of those local markets.

Point No. 5, [they devote] a greater effort to covering local government issues, local elections, things of that nature.

Point No. 6, they pay special attention to issues concerning women.

Point No. 7, broadcasting in languages other than in English, especially Hispanic programmed stations.

Point No. 8, they have staffs on public affairs programs that include minority employees.

Point No. 9, they use call-in formats to allow audience participation.

Point No. 10, they participate in minority-related events in their communities.

Now beyond these points that were covered by the National Association of Black Owned Broadcasters, I'd like to add a couple of points[.] Black radio has played a key role in increasing black voter registration across this country. They've had a major impact on electing African American elective officials across America.

In two markets where I've worked, I've witnessed the election of the first African American mayors in the cites of New York and Chicago. And that would not have happened without black-owned radio stations in those markets.

* * * * *

ANNEX 4

Minority And Nonminority Commercial Radio
Owners' Holdings In The Top 50 Markets

David Honig
Executive Director
Minority Media and Telecommunications Council

September 4, 2003

A community of license designation to a market's dominant commercial center is usually highly desired, since it typically ensures full market coverage and mainstream advertiser acceptability.1/

Using the BIAfn Radio Yearbook (First Edition, Spring, 2003) we examined the holdings of commercially operated minority owned and nonminority owned stations2/ in the top 50 radio markets.3/ We used MMTC's internal database of minority owners (last updated May, 2003) to break out the FCC-licensed4/ commercial stations5/ in each market into eight categories:

1. Nonminority owned FM in a market's dominant commercial center
2. Nonminority owned FM not in a market's dominant commercial center
3. Minority owned FM in a market's dominant commercial center
4. Minority owned FM not in a market's dominant commercial center
5. Nonminority owned AM in a market's dominant commercial center
6. Nonminority owned FM not in a market's dominant commercial center
7. Minority owned FM in a market's dominant commercial center
8. Minority owned FM not in a market's dominant commercial center.

1/ In some cases, a high powered facility with another license designation may have similar value (e.g. Arlington, TX, located roughly midway between Dallas and Ft. Worth) but these situations are fairly rare and should not materially impact our analysis.

2/ Minority owned stations included those held by two public companies controlled by minorities (Radio One and Radio Unica) but not those in a minority-managed public company in which legal control is not held by minorities (Entravision Communications) or in a number of nonminority managed companies (publicly held or privately held) largely targeting minority consumers (Mega Communications, Hispanic Broadcasting Corporation, and Univision Communications). We note, however, that some of these companies, like minority owned companies, appear to have encountered difficulties in securing full power stations licensed to major population centers.

3/ The source for our data was BIAfn's Radio Market Report (First Edition, Spring, 2003).

4/ Our analysis excluded Canadian and Mexican stations (those with "C" or "X" calls). One commercial station was excluded because it is owned by a municipality (which has no race).

5/ Thus, we excluded from our analysis six stations licensed to public broadcasters.

We treated each market as having one and only one dominant commercial center. Thus, in hyphenated markets, the dominant communities were, respectively, Dallas, Houston, Miami, Seattle, Minneapolis, Tampa, Riverside, Salt Lake City, Milwaukee, Providence, Charlotte, Norfolk, Greensboro, Raleigh and West Palm Beach. We did not include stations in two county-based markets in which there is no dominant commercial center (Nassau-Suffolk and Middlesex-Somerset-Union). We also did not include Puerto Rico, which for allotment purposes is really several sub-markets although it is a single market for commercial purposes. Stations listed by BIAfn in more than one market were counted only in the market containing their community of license. Stations with hyphenated (multi-community) allotments were treated as belonging to the larger of these communities.

The results are given in the tables below.

Table 1

Minority and Nonminority Commercial FM
Station Owners' Holdings In The Top 50 Markets

Market	Nonminority Owned Stations		Minority Owned Stations	
	Licensed to Dominant Community	Licensed to Other Community	Licensed to Dominant Community	Licensed to Other Community
New York City	10	28	2	3
Los Angeles	14	13	2	8
Chicago	14	28	0	4
San Francisco	15	21	0	4
Dallas-Ft. Worth	5	29	1	1
Philadelphia	13	1	0	2
Houston-Galveston	9	13	2	1
Washington, DC	7	14	2	1
Boston	7	18	0	1
Detroit	13	5	2	1
Atlanta	7	17	0	4
Miami-Ft. Laud.-Holly.	6	10	0	3
Seattle-Tacoma	11	9	0	0
Phoenix	6	19	0	0
Minneapolis-St. Paul	4	15	0	1
San Diego	11	7	0	0
Baltimore	7	7	1	1
St. Louis	7	17	0	1
Tampa-St. Petersburg	4	10	0	1
Denver-Boulder	9	8	0	0
Pittsburgh	10	10	0	2
Portland, OR	9	7	0	0
Cleveland	9	3	2	0
Cincinnati	7	14	0	1
Sacramento	8	11	1	2
Riverside-San Bernadino	2	8	0	7
Kansas City	8	8	1	2
San Jose	3	6	0	0
San Antonio	9	10	0	1
Salt Lake City-Ogden	7	17	0	0
Milwaukee-Racine	6	11	2	0
Providence-War.-Paw.	5	11	0	0
Columbus, OH	5	14	2	1

Table 1 (continued)

Minority and Nonminority Commercial FM
Station Owners' Holdings In The Top 50 Markets

Market	Nonminority Owned Stations		Minority Owned Stations	
	Licensed to Dominant Community	Licensed to Other Community	Licensed to Dominant Community	Licensed to Other Community
Charlotte-Gast.-Rock H.	4	10	0	1
Orlando	5	6	0	0
Las Vegas	9	13	0	0
Norfolk-Va. B.-N. News	7	10	0	1
Indianapolis	7	9	1	2
Austin	5	13	0	1
Greensboro-W.S.-H.Pt.	2	13	0	0
New Orleans	7	10	0	1
Nashville	5	18	0	0
Raleigh-Durham	4	8	0	4
West Palm Beach-B.R.	3	11	0	0
Memphis	6	17	0	0
Hartford-N.B.-Midd.	6	7	0	0
Jacksonville, FL	6	10	0	3
TOTAL	343	554	21	66
Percent of Nonminority Owned Stations	38.2%	61.8%	--	--
Percent of Minority Owned Stations	--	--	24.1%	75.9%

Table 2

Minority and Nonminority Commercial AM
Station Owners' Holdings In The Top 50 Markets

Market	Nonminority Owned Stations		Minority Owned Stations	
	Licensed to Dominant Community	Licensed to Other Community	Licensed to Dominant Community	Licensed to Other Community
New York City	9	19	5	2
Los Angeles	8	17	2	7
Chicago	11	11	1	4
San Francisco	8	13	2	5
Dallas-Ft. Worth	4	18	0	4
Philadelphia	9	11	2	3
Houston-Galveston	8	9	3	6
Washington, DC	5	14	2	5
Boston	8	26	1	2
Detroit	5	12	1	1
Atlanta	10	24	1	8

Table 2 (continued)

Minority and Nonminority Commercial AM
Station Owners' Holdings In The Top 50 Markets

Market	Nonminority Owned Stations: Licensed to Dominant Community	Nonminority Owned Stations: Licensed to Other Community	Minority Owned Stations: Licensed to Dominant Community	Minority Owned Stations: Licensed to Other Community
Miami-Ft. Laud.-Holly.	6	9	3	9
Seattle-Tacoma	11	19	0	6
Phoenix	8	10	3	0
Minneapolis-St. Paul	4	19	0	0
San Diego	5	5	2	0
Baltimore	8	8	2	0
St. Louis	8	17	0	1
Tampa-St. Petersburg	3	17	1	3
Denver-Boulder	8	12	2	0
Pittsburgh	7	19	0	3
Portland, OR	9	17	0	1
Cleveland	5	8	3	0
Cincinnati	5	6	2	0
Sacramento	6	8	1	2
Riverside-San Bernadino	1	9	0	3
Kansas City	7	10	2	0
San Jose	2	2	2	1
San Antonio	9	7	3	3
Salt Lake City-Ogden	6	15	0	2
Milwaukee-Racine	5	6	1	3
Providence-War.-Paw.	4	14	0	1
Columbus, OH	5	6	1	0
Charlotte-Gast.-Rock H.	5	20	1	0
Orlando	5	0	0	8
Las Vegas	6	6	0	0
Norfolk-Va. B.-N. News	5	11	0	3
Indianapolis	6	3	1	0
Austin	2	5	1	4
Greensboro-W.S.-H.Pt.	5	21	0	1
New Orleans	10	5	1	1
Nashville	7	17	0	0
Raleigh-Durham	5	15	0	3
West Palm Beach-B.R.	3	11	0	2
Memphis	8	12	1	0
Hartford-N.B.-Midd.	3	10	0	2
Jacksonville, FL	12	6	1	0
TOTAL	299	560	54	109
Percent of Nonminority Owned Stations	34.8%	65.2%	--	--
Percent of Minority Owned Stations	--	--	33.1%	66.9%

There are not statistically significant differences in the community of license designations of minority vis-a-vis nonminority AM stations.

Minority owned FM stations' community of license designations are substantially less attractive than those of nonminority owned FM stations. In particular, only 24.1% of the minority owned stations were licensed to the dominant community in the market, while 38.2% of the nonminority owned stations were licensed to the dominant community in the market. Thus, minority owned stations were only 63% as likely to be licensed to the dominant community in the market as were the nonminority owned stations in the same markets. A chi-square analysis showed statistical significance at well below the 0.01 level.

* * * * *